



NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

WASHINGTON, D.C. 20570

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REPORT OF THE GENERAL COUNSEL

This report covers selected cases of interest that were decided during the period from October 1, 1995 through March 31, 1996. It discusses cases which were decided upon a request for advice from a Regional Director or on appeal from a Regional Director's dismissal of unfair labor practice charges. It also summarizes cases in which I sought and obtained Board authorization to institute injunction proceedings under Section 10(j) of the Act.

A handwritten signature in cursive script, reading "Fred Feinstein", is written over a horizontal line.

Fred Feinstein
General Counsel

EMPLOYER INTERFERENCE WITH PROTECTED ACTIVITIES

Ministerial Assistance in the Filing of
A Decertification Election Petition

In one case, we considered whether the Employer unlawfully provided more than ministerial aid to an employee who sought to file a decertification (RD) petition during the government shutdown in December 1995.

The petitioner-employee had independently gathered employee signatures to decertify the Union. There was no evidence of Employer involvement and the last signature was dated December 26, 1995. The petitioner, who was on vacation during the Christmas holiday week, knew about the 60-90 day window period before contract expiration for the filing of RD petitions. The petitioner also knew that February 28, 1996 was the expiration date of the current contract.

The petitioner did not have a copy of the Board's RD petition form that is normally filed with employees signatures, i.e., with a showing of interest. The petitioner also knew that the local Regional Office was shut down. On December 28 or 29, the petitioner gave the showing of interest to the Employer who told petitioner that he did not know what to do with it, but he would take care of it.

The Employer called his attorney who faxed a copy of the Board RD petition form to the Employer. The Employer called in the petitioner and gave him the Board RD petition form. The Employer also advised him that if he wanted to send it to the Board, he had to do it the right way with that form which had been completely typed in. Petitioner signed and dated the form and gave it back to the Employer. The Employer faxed the signed RD petition back to its law firm, who faxed it to the Regional Office. On January 16, 1996, after the government shutdown ended, the original showing of interest was supplied by the law firm to the Regional Office.

We decided to dismiss the charge because the conduct of the Employer and its attorney had not interfered with or restrained the employees in the free exercise of their Section 7 rights.

It is well settled that an employer may not solicit, support, or assist in the initiation, signing, or filing of an employee decertification petition. See, e.g., Placke Toyota, Inc., 215 NLRB 395 (1974); Dayton Blueprint Co., 193

NLRB 1100, 1107-08 (1971). However, employer involvement is not per se unlawful. Eastern States Optical Co., 275 NLRB 371 (1985). For example, the Board will not find a violation where the employer's conduct constitutes no more than "mere ministerial aid", Consolidated Rebuilders, Inc., 171 NLRB 1415, 1417 (1968), or where the employer is simply assisting employees in the realization of an independently arrived at decision, Washington Street Foundry, 268 NLRB 338, 339 (1983), or in "the expression of their predetermined objectives." Eastern States Optical Co., supra at 373; Poly Ultra Plastics, 231 NLRB 787, 790 (1977). The test is whether the specific conduct had "the tendency...to interfere with the free exercise of the rights guaranteed to employees under the Act." Washington Street Foundry, supra at 339, quoting from The Red Rock Co., 84 NLRB 521, 525 (1949), enfd. as modified 187 F.2d 76 (5th Cir. 1951), cert. den. 341 U.S. 950 (1951)..

In Washington Brass & Iron Foundry, 268 NLRB 338 (1983), during the certification year, an employee drafted a decertification petition and presented the draft to the employer's consultant for advice. The Employer's agent commented that "it was a little bit early" to be able to get rid of the union, and recommended changing "we the employees" to "we, the undersigned" and to include the union's full name in the petition. Employees then circulated and signed the petition "without further manifestation of [the employer's] approval." Id. The employer allowed the employee to take the day off to file the petition, subject to Saturday makeup time which was a routine practice. The employer's agent accepted a copy of the decertification petition offered to him by the employee, and gave the employee a ride to the Board's Regional Office. The Board did not find a violation reasoning that acts by the employer after the petition had been signed "plainly had no impact on the employees' willingness to sign the petition." Further, prior to the petition's circulation the Employer had provided nothing but "inconsequential phrases upon the request of a specific employee".

Similarly, in Eastern States Optical, supra, the Board held that an employer did not provide more than lawful "ministerial aid" in support of a decertification petition. In that case, the employer's attorney, in response to questions from employees who had told him that decertification proceedings were being carried on: helped the employee in wording the decertification petition; gave the employee a description of the bargaining unit and names of employer officials; and told the employee that it probably would be sufficient if six of the eight bargaining-

unit employees signed the petition. The attorney also permitted an employee to sign the decertification petition in the vice-president's office, where the petition had already served as a basis for the employer's withdrawal of recognition and the employee approached the vice-president and expressed her own voluntary desire to sign the petition.

In our case, like Washington Brass & Foundry and Eastern States Optical, the Employer's actions had no impact on the employees' willingness to sign the petition. The employee-petitioner had already prepared and circulated a showing of interest to decertify the Union on his own. In fact, the last signature on the showing of interest had been signed before the petitioner went to the Employer. Petitioner would have gone directly to the Regional Office had it not been closed due to the government shutdown. The Employer's only assistance was in contacting its attorney, securing the appropriate RD form, typing in the necessary information, and sending the signed form to its attorney who sent it to the Board. Since all this occurred after the employees had already freely decided to seek a decertification election, we decided that the Employer's actions were privileged.

Prohibition of Union Insignia and Untimely Hiring of Striker Replacement

In a set of cases involving a dispute at a nursing home, we decided several interesting questions concerning employer efforts to limit the wearing of union insignia and whether an employer could permanently replace economic strikers after the union had informed the employer that the strikers would return to work the next day.

The Employer operated an intermediate and personal care nursing home. After the most recent collective-bargaining agreement expired, the parties began negotiating a new agreement. On March 31, the Union provided a Section 8(g) 10-day notice, stating in a letter to the Employer that the employees would engage in a "strike or picketing or other concerted activities at the . . . facilities beginning at 5:30 a.m. on Thursday, April 13, 1995."

On April 3, at the request of the Union, several employees wore a fluorescent green sticker approximately the size of a \$.50 piece on their uniform or person. Some of these stickers were blank, and others had handwritten numbers representing the number of days remaining before the contract expired. The Employer's Director of Nursing told

the employees to remove the stickers, and explained that they were against policy. The personnel policy manual provides that employees were permitted to wear professional pins provided by the Employer, but could not wear any other ribbons, stickers, buttons or insignia. Despite this rule, there was evidence that the Employer had permitted the employees to wear seasonal and religious pins. The Employer also said that the stickers were upsetting the residents. However, the Employer presented no evidence that patients were concerned about or upset by the stickers. Employees who continued to wear the sticker were issued disciplinary warnings and, in some cases, suspended. The Employer also reported these employees to the state department of health and licensing board, under federal and state guidelines prohibiting actions by health care personnel that cause physical or emotional harm to a patient.

On April 11, at the close of a contract negotiation session, the Union handed Employer representatives a letter stating that employees would take a strike vote on the following day, and, if they voted to strike, would strike for approximately 24 hours. The letter further stated that "Striking workers will return to work as scheduled on Friday April 14, 1995, beginning the daylight shift for the respective departments in each facility."

On April 13, the employees commenced striking at 5:30 a.m. Approximately 35 of the 54 employees participated in the work stoppage. Later that day, the Employer notified the Union by fax that it had replaced several employees in response to "both the threatened work stoppage and the work stoppage which began this morning." The fax further stated that, upon receipt of an unconditional offer to return to work, the Employer would review the work schedules of employees and notify them when to report to work. In response, the Union sent a letter by fax repeating the unconditional offer to return to work. The Employer responded with a fax acknowledging receipt of the unconditional offer and advising that four employees had been permanently replaced and would be recalled as positions became available. The rest of the employees returned to work on April 14.

The Region obtained evidence demonstrating that the Employer did not hire permanent replacements until after the strike began. The Region concluded that the Employer discriminatorily chose specific employees for replacement, in violation of Section 8(a)(3), because they had been Union activists.

We decided that the Employer violated Section 8(a)(1) of the Act by prohibiting its employees from wearing Union insignia, disciplining them for refusing to remove the insignia, and reporting them to the state department of health and the state nurses' licensing board.

A. Reports to State Agencies

In finding a violation, we relied on Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 895-97 (1984) (although reporting a violation of the criminal laws is conduct which should otherwise be encouraged, reporting the presence of an illegal alien in retaliation for the employee's protected activities violates the Act).

B. The Union Stickers

In a health care setting, employees have a protected right to wear union insignia at work in the absence of "special circumstances" privileging the banning of union insignia where the employer is motivated by a genuine concern for the health and welfare of its patients, and does not discriminatorily prohibit union insignia while permitting other similar accessories. Holladay Park Hospital, 262 NLRB 278, 279 (1982).

In determining whether an employer's prohibition of union insignia was motivated by a genuine concern for the health and welfare of its patients, the Board requires some evidence to support the employer's assertion that patients would be concerned about, or upset by, the insignia. Thus, in St. Luke's Hospital, 314 NLRB 434 (1994), the administrative law judge found "special circumstances" in the banning of a "United To Fight For Our Health Plan" sticker, holding that patients could be upset by the implicit message that the employer and its employees were "at odds" with each other. Id. at 439. The Board reversed and found a violation, stating that the "possibility" that patients would be upset did not establish special circumstances where "the record is devoid of any evidence to support [the] supposition" that "patients might be upset by the buttons," and there was "no evidence that any patient complained of, or even noticed, the stickers and buttons at issue in this case." Id. at 436.

Here, the Employer provided no evidence that the Union stickers had caused, or would cause, patients' concern. The message on the stickers was not one intrinsically upsetting to someone depending upon the nursing home for care. Although patients might have been curious about the

unexplained numbers and have asked employees about them, the Board would not presume, without evidence, that any such discussions would have upset patients or interfered with their care. See Holladay Park Hospital, 262 NLRB at 279. Thus, we decided that the Employer had not shown "special circumstances" privileging its prohibition of Union insignia.

Moreover, the Employer discriminatorily banned Union insignia while permitting seasonal and religious pins to be worn on employee uniforms. The Board will not find "special circumstances" justifying a prohibition against wearing union insignia if the employer has permitted employees to wear other types of buttons or accessories. See Holladay Park Hospital, 262 NLRB at 279.

Finally, even if the Board were to find "special circumstances" privileging the banning of the Union stickers in immediate patient care areas, it was clear in this case that the Employer's prohibition of the insignia in all areas of the facility was overbroad. A health care employer's prohibition of insignia was overbroad unless the employer specifically permits the wearing of insignia in non-patient care areas where it cannot demonstrate an adverse effect on patient care. Holyoke Visiting Nurses Assn., 313 NLRB 1040, 1045-1046 (1994). See also Mesa Vista Hospital, 280 NLRB 298 (1986).

C. The Permanent Replacement of Employees

We further decided that the Employer violated Section 8(a)(3) and (1) of the Act when it permanently replaced four strikers after the Union had made an unconditional offer to return to work.

If employees engage in a lawful economic strike, an employer may hire permanent replacements only until those on strike have made an unconditional request for reinstatement. See Ramada Inn, 201 NLRB 431, 437 (1973) (four hours after start of strike, union sent telegram offering unconditional offer to return to work the following day; employer's permanent replacement of one employee after receipt of that telegram violated Section 8(a)(3)); Lockwoven Company, 245 NLRB 1362, 1372 (1979); Daniel Construction Co., 264 NLRB 569, 606-607 (1982), *enfd.* 731 F.2d 191 (4th Cir. 1984); Choctaw Maid Farms, 308 NLRB 521, 528 (1992). Once strikers have made such a request and a vacancy still exists, an employer must permit their return, absent a showing of "legitimate and substantial business justification" for the

failure to offer full reinstatement. NLRB v. Fleetwood Trailer Co., 388 U.S. 375, 378-379 (1967).

Here, the Union told the Employer, before the employees went on strike, that the employees would return to work, according to their regular schedules, the following day. Thus, when the Employer hired permanent replacements later that day, it was doing so after the unit members on strike had made their unconditional offer to return. Thus, the Employer did not lawfully hire permanent replacements and failed to accord economic strikers their Laidlaw rights by refusing to reinstate them to vacant positions after the strike.

EMPLOYER DISCRIMINATION

False Notifications to Strikers

During this quarter we considered the issues of whether, after the Union began an economic strike, the Employer violated Sections 8(a)(1) and (3) of the Act by: (1) sending letters notifying strikers that they had been permanently replaced, even though vacancies still existed in the strikers' job classifications; (2) refusing to reinstate striking employees, even if they were permanently replaced, because the strike had converted to an unfair labor practice strike prior to the strikers' replacement; (3) hiring permanent replacements for striking employees without giving striking employees or the Union advance notice thereof; (4) stating, after letters notifying strikers of their permanent replacement had already been sent, that it was "too late" for replaced strikers to offer to return to work; and (5) hiring additional replacements after strikers offered to return to work.

First, we decided that the Employer violated Sections 8(a)(1) and (3) of the Act by sending letters notifying strikers that they had been permanently replaced, because vacancies still existed in the strikers' job classifications. It is well established that, when an employer falsely informs striking employees that they have been permanently replaced, the employer unlawfully discharges the strikers in violation of Section 8(a)(1) and (3) of the Act. See, e.g., Mars Sales and Equipment Co., 242 NLRB at 1097, 1100-1102; W. C. McQuaide, Inc., 237 NLRB at 179. The employer admitted that it informed strikers that they had been permanently replaced prior to filling job classifications. It therefore falsely notified such

strikers of their permanent replacement and unlawfully discharged them in violation of Sections 8(a)(1) and (3).

Second, we decided that the Employer unlawfully refused to reinstate striking employees, even if they were permanently replaced, because we had decided that the strike had converted to an unfair labor practice strike. We concluded that various unilateral changes by the Employer, the unlawful discharges of several strikers, and the false notification to strikers that they were permanently replaced converted the economic strike to an unfair labor practice strike. Third, we decided that the Employer had no duty to inform striking employees or the Union prior to permanent replacement. In Times Publishing Co., 72 NLRB 676, 684 (1947), the Board explicitly stated that the respondents there, "were under no duty to notify the Union of their intention to hire replacements." More recently, in Armored Transfer Services, 287 NLRB 1244, 1251 n. 21 (1988), the Board affirmed an administrative law judge's decision that included a statement that, "the Company had no obligation to notify the strikers before hiring replacements." Thus, the Board has never explicitly required such notice and has also affirmatively indicated that an employer has no obligation to notify striking employees or their union prior to hiring permanent replacements.

Fourth, we decided that the Employer did not violate the Act by telling a Union official, after the Employer had begun to send out letters informing strikers that they had been permanently replaced, that it was "too late" for the Union to make an unconditional offer to return to work on behalf of the replaced strikers. If the Employer had indeed lawfully permanently replaced the strikers at issue, the Employer would have been privileged, as a matter of law, to refuse to displace the lawful permanent replacements in order to return the strikers to their jobs. See, e.g., Laidlaw Corp., 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1968), *cert. denied* 397 U.S. 920 (1970); NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 380 (1967). Thus, in stating that it was "too late" for permanently replaced strikers to return to work, the Employer would merely have been informing the Union of its lawful position in this regard. In such circumstances, the Employer's truthful notification to the Union that it was "too late" for the Union to make an unconditional offer to return to work on behalf of the replaced strikers did not violate the Act.

Fifth, we decided that the Employer did not unlawfully hire replacements after strikers offered to return to work. The Union based its allegation upon Employer records showing

that replacements commenced work after the Union's unconditional offer to return to work. The Board has held, however, that permanent replacements are considered to fill jobs left vacant by striking employees as of the time that the replacements accept the employer's offer of permanent employment in the job, rather than the time at which they actually begin work. See, e.g., J.M.A. Holdings, Inc., 310 NLRB 1349 (1993); Solar Turbines, Inc., 302 NLRB 14 (1991), petition for review denied mem. 148 LRRM 2128 (9th Cir. 1993), and cases cited therein; Home Insulation Service, 255 NLRB 311, 312 n. 9 (1981), enfd. mem. 665 F.2d 352 (11th Cir. 1981). The Employer presented evidence showing that the replacements had accepted the Employer's employment offer prior to the time that the Union made its unconditional offer to return to work. Thus, in the absence of any evidence that would indicate that these letters do not genuinely reflect the time at which the replacements accepted employment, there is no basis for finding their hiring to be unlawful.

EMPLOYER REFUSAL TO BARGAIN

Claimed Need to be "Competitive" Requiring the Supplying of Financial Information

In one case we considered whether the Employer had violated the Act when it refused to provide financial information to the Union.

During negotiations for a successor collective-bargaining agreement, the Union proposed a substantial across-the-board wage increase. The Employer responded both orally and in writing that the Company was not doing well and that there was no justification for the Union's proposals. The Employer emphasized the Company's poor past performance and claimed that it did not expect to have a good year. The Employer cited the recent layoffs of several employees and managers, the Employer's struggle for market share in a declining market, and low projections for the upcoming year. The Employer also noted its plans to sell one division, which it claimed would put an even greater strain on budgeting for overhead, and stated that there was a need to exercise sound business judgment. While asserting that the Company had experienced flat sales and increasing costs, the Employer maintained that it was not claiming poverty or inability to pay. Although it rejected the Union's across-the-board wage proposal, the Employer stated that it was willing to consider merit raises and expressed

the hope that business would support such raises on an individual basis.

The Union asked the Employer to provide financial information to support its position regarding the Union's wage proposal. The Employer initially refused to provide any such information. However, it later offered to disclose certain financial information to a single Union official, provided that access to the information was restricted and assurances of confidentiality were given. The Union refused to restrict the flow of information to its membership, but offered to enter into a confidentiality agreement which would be binding on all members of the Union. The Employer responded that the Union's proposal to insure confidentiality did not sufficiently protect the Company's interests. The Employer then offered to provide certain specified information, provided that access to the information was limited to Union representatives on a need-to-know basis for purposes of collective bargaining and further provided that all members of the Union bargaining committee signed a confidentiality agreement assuring that they would not disclose the information to any other person. The Union did not respond to this offer, and the Employer never provided any financial information to the Union.

We concluded that, even under current Board law, the Employer's statements constituted a claim of inability to pay the wage increases proposed by the Union, and thus the Employer had violated Section 8(a)(5) and (1) of the Act by refusing to provide financial information to substantiate its claim. We also decided to ask the Board to reconsider its determination that a claim of non-competitiveness is not tantamount to a claim of inability to pay.

Although an employer is not required to provide financial information which is not relevant to the union's duties as collective-bargaining representative, an employer's claim of financial inability to meet a union's bargaining demands triggers an obligation to furnish, upon request, financial information substantiating that claim. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). A determination regarding an employer's duty to provide such information must be made on a case-by-case basis to ascertain whether the employer is claiming a present inability to pay as opposed to, for example, competitive disadvantage or lower profits. Nielsen Lithographing Co., 305 NLRB 697 (1991). While claims of competitive disadvantage or lower profits do not trigger an obligation to provide financial information under present Board law, a claim of current inability to pay does trigger such an

obligation. Id. Thus, where an employer indicates that its bargaining position is a matter of necessity because of current financial losses, the union is entitled, upon request, to information pertaining to the alleged losses and their impact on the employer's business. Stroehmann Bakeries, 318 NLRB No. 110, slip op. at 11 (Sept. 11, 1995). Moreover, "the employer violates its bargaining obligation by failing or refusing to provide such information, notwithstanding an express disclaimer that it is pleading inability to pay, where the thrust of the employer's position indicates otherwise." Id.

We concluded that, even under current Board law, the Employer's actions and comments supported a finding that it was claiming a present inability to pay notwithstanding its statements to the contrary, and thus the Union was entitled to relevant financial information. Stroehmann, supra. We noted that in response to the Union's wage proposal, the Employer emphasized its disappointing past performance and a present situation wherein both employees and management had been laid off and the business was not doing well. The Employer never wavered from the position that the business did not justify wage increases while simultaneously laying off personnel and planning to close an entire division of the Company.

We also decided to ask the Board to reconsider its determination in Nielsen Lithographing Co., supra, that a claim of non-competitiveness does not trigger an obligation to provide supporting documentation upon request, and to return to its decision in Harvstone Mfg. Corp., 272 NLRB 939 (1984), rev'd, 785 F.2d 570 (7th Cir. 1986). The current state of the law encourages "gamesmanship," such as occurred here, where an employer suggests that it cannot afford to pay a wage increase while simultaneously disclaiming an inability to pay. In Harvstone Mfg. Corp., supra, the Board adopted the Administrative Law Judge's determination that claims of a desire to be competitive constituted a plea of poverty sufficient to trigger an obligation to supply the requested information. As reflected in the ALJ's decision, an employer need not use magic words, such as a plea of poverty, to be required to supply financial information, and there is no material difference between claiming competitive factors and pleading inability to pay. Id. at 943-944. The position we are taking is consistent with the dissent of then-Chairman Stephens in Nielson.

Finally, with regard to the Employer's request for assurances of confidentiality, the Employer never supplied any reasons for requiring confidentiality. In dealing with

union requests for assertedly confidential information, the Board must balance a union's need for the information against any "legitimate and substantial" confidentiality interests established by the employer, and the party asserting a confidentiality interest has the burden of proof. Taylor Hospital, 317 NLRB 991, 994 (1995), citing Pennsylvania Power Co., 301 NLRB 1104 (1991). The Employer provided no basis to support its claimed need for confidentiality and, therefore, could not impose a confidentiality requirement as a condition for furnishing the requested information.

Accordingly, we determined that a complaint should issue alleging that the Employer violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide financial information requested by the Union.

Refusal to Honor Checkoff Authorizations After Bargaining Agreement Expiration

We decided in one case that an employer was not privileged, upon expiration of a collective bargaining agreement, to cease deducting dues pursuant to outstanding, unrevoked checkoff authorizations.

The Employer and Union were parties to a collective bargaining agreement expiring in September 1994. The agreement contained union security provisions and provided for the payment of dues by voluntary checkoff. The checkoff forms provided, in substance, that the authorization was to remain in full force and effect until revoked in writing by either the Union or the employee.

The parties commenced contract renewal negotiations in August 1994 and extended the term of the agreement through January 1995 as negotiations continued. Further negotiations failed to produce agreement and the contract expired. The Employer thereafter ceased deducting dues from employees' pay although no employees had resigned their Union membership or had revoked their checkoff authorizations. The Union then filed the subject charge, alleging that the unilateral discontinuance of the dues deductions was violative of Section 8(a)(5). We concluded that, after contract expiration, a provision for dues checkoff, like any other mandatory term and condition of employment, remains subject to bargaining before it can be changed. Case law to the contrary was deemed distinguishable or wrongly decided.

In NLRB v. Katz, 369 U.S. 736 (1962), the Supreme Court held that an employer violates Section 8(a)(5) by unilaterally instituting changes not previously discussed to impasse. See also, NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217, 225 (1949); Harold N. Hinson, d/b/a Hen House Market No. 3, 175 NLRB 596 (1969), enf'd, 428 F.2d 133 (9th Cir. 1970). Indeed, the Court has long held virtually all post-expiration unilateral changes to be unlawful absent impasse. Crompton-Highland Mills, Inc., supra. In our view, since the checkoff authorizations, on their face, did not limit their application and duration to the contractual union security requirement, and since the employees did not seek to revoke their authorizations, the authorizations should not be presumed to have expired with the expiration of the collective bargaining agreement. Accordingly, since the matter of dues checkoff is a mandatory subject for bargaining, no changes could be made by the Employer regarding the voluntary, unrevoked checkoff authorizations without bargaining with the Union.

In Bethlehem Steel Company, 136 NLRB 1500 (1962) (enf.den. on other grounds, sub nom Industrial Union of Marine & Shipbuilding Workers v. N.L.R.B., 320 F.2d 615 (3rd Cir. 1963), cert. den., 375 U.S. 984 (1964)), the Board held that it was not unlawful for the employer to unilaterally discontinue union security and dues checkoff provisions upon the expiration of a collective agreement. Concerning the union security provisions, the Board explained (id. at 1502):

The acquisition and maintenance of union membership cannot be made a condition of employment except under a contract which conforms to the proviso to Section 8(a)(3). So long as such a contract is in force, the parties may, consistent with its union-security provisions, require union membership as a condition of employment. However, upon the termination of a union-security contract, the union-security provisions become inoperative and no justification remains for either party to the contract thereafter to impose union-security requirements. Consequently, when, upon expiration of its contracts with the Union, the Respondent refused to continue to require newly hired employees to join the Union after 30 days of employment, it was acting in accordance with the mandate of the Act.

The Board concluded that "[s]imilar considerations prevail with respect to the [employer's] refusal to continue to check off dues after the end of the contracts." Id. The Board explained (id.):

The checkoff provisions in Respondent's contracts with the Union implemented the union-security provisions. The Union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force. The very language of the contracts links Respondent's checkoff obligation to the Union with the duration of the contracts. Thus, they read: ". . . the Company will, beginning the month in which this Agreement is signed and so long as this Agreement shall remain in effect, deduct from the pay of such Employee each month . . . his periodic Union dues for that month."

Although in Bethlehem Steel, the Board expressly relied on the language of the contract making checkoff coterminous with contract expiration, in subsequent cases the Board has stated the rule regarding nonsurvival of checkoff requirements broadly, without any reference to the relationship between a checkoff clause and a union security agreement. See e.g., Sonya Trucking Co., 312 NLRB 1159, 1160 (1963); National Football League, 309 NLRB 78, 106 n.33 (1992); R.E.C. Corp., 296 NLRB 1293 n.3 (1989). See also Litton Financial Printing v. NLRB, 498 U.S. 1045, (1991) (noting, but not ruling on, the Board's position in Bethlehem Steel). However, it appears that the Board has never directly confronted the question of whether a checkoff obligation should be treated differently based on whether or not it "implemented" a union security requirement. We decided to put this issue to the Board and argue that checkoff clauses that do not expressly implement union security requirements should survive expiration of the agreement. We concluded that there is no statutory requirement that checkoff authorizations automatically expire upon contract expiration, that analogous Board precedent counsels against implying such a requirement and that there are no compelling policy reasons for automatic linkage.

As the Board noted in Bethlehem Steel, supra, the proviso to Section 8(a)(3) requires that union security clauses terminate upon contract expiration. There is no such statutory requirement in regard to checkoff authorizations. Indeed, the Board has held that it does not violate Section 8(a)(3) to check off dues in the absence of a collective agreement. See Lowell Corrugated Container Corp., 177 NLRB 169, 172-173 (1969) (employer did not violate Sections 8(a)(2) and (3) by continuing to honor unrevoked checkoffs after expiration of the collective-bargaining agreement). See also, Yaloz Mold and Die Co., Inc., 256 NLRB 30, 37 (1981) (employer did not violate the Act in continuing to deduct and transmit dues after the incumbent union lost the election as there was no evidence employees' checkoff authorizations were ever canceled); Frito-Lay, 243 NLRB 137, 138-139 (1979) (irrespective of the existence of a contract with a union-security clause, an employee-submitted checkoff authorization that had not been revoked, abrogated, terminated or canceled may be honored during its term by the employer); and, see International Chemical Workers Union Local 143 (Lederle Laboratories), 188 NLRB 705 (1971) (union did not violate Section 8(b)(1)(A) in demanding that dues be deducted from paychecks and remitted during contractual hiatus period when checkoff and authorizations remained unrevoked). Significantly, checkoff provisions may be agreed to and enforced in right-to-work states, where union security agreements would be unlawful. See Shen-Mar Food Products, 221 NLRB 1329, 1330 (1976), enf'd as modified 557 F.2d 396 (4th Cir. 1977) (dues checkoff authorizations could not properly be viewed as union security devices, which the state was permitted to prohibit under Section 14(b), because they did not "impose union membership or support as a condition required for continued employment").

Moreover, Section 302(c)(4), which requires a written authorization by an employee for a checkoff arrangement, does not require an agreement between an employer and the union. See Gulf-Wandes Corp., 236 NLRB 810, 816 (1978). Section 302(c)(4) requires only that written authorizations from employees be revocable at the end of a year or the expiration of a collective agreement, whichever occurs first, implying that, absent revocation they survive. The legislative history of Section 302 supports the view that checkoff authorizations "may continue indefinitely until revoked." II Legislative History of the Labor-Management Relations Act, 1304, 1311 (1948).

Nor do policy considerations dictate treating union security and checkoff clauses the same for purposes of

expiration. Although union security and checkoff authorizations are often viewed together, they are different types of obligations. Checkoff agreements, for example, give rise to independent wage assignment contracts between the employees and employer that have been held to survive expiration of the collective-bargaining agreement when the parties so intend. See, Frito Lay, Inc., 243 NLRB 137 (1979) (no 8(a)(3)/8(b)(1)(A) violation where union sought, and employer deducted, dues pursuant to authorizations that employees had not timely revoked, despite termination of collective-bargaining agreement; language of authorizations provided for continued checkoff, absent revocation, beyond termination of the agreement); Associated Press, 199 NLRB 1110, 1112 (1972) (arbitrator, to whom Board deferred in 8(a)(3)/8(b)(1)(A) case, held that checkoff was a "wage assignment" which existed apart from the collective-bargaining agreement and therefore "survived the expiration of the contract and the employees were bound by its terms as was the employer"). See also International Brotherhood of Electrical Workers, Local 2088 (Lockheed Space Operations Company), 302 NLRB 322, 327-28 (1991) (checkoff authorization does not necessarily expire with resignation from union). Thus, we concluded that where the parties to the checkoff arrangement did not provide for expiration on contract termination, their intent should be given effect.

Duty to Supply Information About Supervisors

In another case, we considered the circumstances under which an employer is required to provide information to a union relative to non-bargaining unit employees. We concluded in our case that the Union had sufficiently established the relevancy of requested information concerning violations of the Employer's safety rules by supervisory employees to warrant requiring the Employer to provide the requested information.

The Employer had a written policy that required all employees to comply with plant safety and health rules and regulations. Safety was considered as part of employee annual evaluations and safety violations were treated as any other performance deficiency which could lead to progressive discipline as well as affect employees' promotion opportunities. Additionally, the Employer's policy stated that management employees had a measurable contribution to make to the safety program.

The Union had raised issues regarding the uniform application of the safety rules at meetings of the plant safety steering committee, which was comprised of Union and management representatives. There was discussion at these meetings about a perceived "double standard" with regard to disciplinary action as it affected unit employees as compared with supervisors. Management representatives repeatedly stated that all employees were accountable for safe work practices.

After some employees had been disciplined for violations of safety rules, the Union asked the Employer if supervisors had been disciplined for similar violations. The Employer replied in the affirmative and the Union representative then asked for copies of such disciplinary notices. The Union also filed grievances with respect to specific safety violations which had been committed by supervisors. Employees who had committed similar violations had been disciplined. The Union requested that the supervisors involved be held accountable and that Union be provided with any disciplinary notices issued to them. In processing the grievances, the Union took the position that the safety program needed to be consistently applied and stated that its objective was to have a safety program that it could sell to its members. The Employer denied the grievances and rejected the Union's request for information concerning the discipline of supervisors.

The Union argued that the requested information was relevant to its representational responsibilities, in that the information would enable it to reassess the discipline issued to unit employees in the past; to decide whether to grieve discipline given to unit employees for violations of the safety rules in the future; to address a grievance that raised the question of a manager's failure to respond to the Union's concerns about an existing safety problem; and to represent the unit whose safety is jeopardized when supervisors are not disciplined for safety violations.

We concluded that the Employer had violated Section 8(a)(5) of the Act in refusing to furnish the requested information respecting discipline of supervisors. Because the information requested concerned supervisors' and managers' safety violation discipline records and those individuals are outside the bargaining unit, the General Counsel bears the burden of demonstrating the relevance of the requested disciplinary records. Pfizer, Inc., 268 NLRB 916, 918 (1984), enfd. 763 F.2d 887 (7th Cir. 1985). The standard for determining the relevance of requested information is a liberal discovery standard that merely

requires information to have some bearing on the issue between the parties. Information of even probable or potential relevance to a union's execution of its duties as collective bargaining representative must be disclosed. Pfizer, Inc., supra at 918.

While the Union's attempt to discipline a supervisor through the grievance system was not, standing alone, a proper basis for the Union's information request, we concluded that the requested information was relevant to the issue of how the Employer's policy was enforced against unit members when compared to the treatment accorded supervisors who were equally covered by the policy. The evidence indicated that, over a period of years, the Union had expressed its concern to the Employer that bargaining unit employees had been treated disparately. In this respect, the instant case was analogous to United States Postal Service, 310 NLRB 391 (1993), wherein two employees had been disciplined for attendance policy violations. The union asked the employer for timecards of supervisors who had been observed violating the same policy. The Board held that the union had established a logical foundation and a factual basis for the information request and found that the employer had violated Section 8(a)(5) of the Act by refusing to provide such information. Id. at 392. Thus, unit employees and supervisors were subject to the same rules and policies, and the union could arguably show disparate treatment in processing the two employees' grievances. Similarly, in our case, unit employees and supervisors were subject to the same safety policies and rules. The Union was aware of potential violations by supervisors, and the information would be relevant to the Union's reconsideration of the past disciplinary decisions.

United States Postal Service, 310 NLRB 701 (1993), wherein the Board held that the employer had not violated Section 8(a)(5) of the Act by refusing to provide the union with requested information concerning the attendance records of supervisors, was considered distinguishable. The union had claimed that the information was relevant to pending grievances regarding discipline given to unit members for attendance policy violations, but in support of the request, the union could only demonstrate a "mere suspicion" that named supervisors were not regularly in attendance. Id. at 702. Here, however, the Union had identified specific safety violations by specific supervisors and the Union's request herein, unlike the cited case, was not asserted to be limited to the Union's representation of employees in a single grievance proceeding.

While there may be questions regarding the Union's ability under the collective bargaining agreement to reopen prior grievances based upon receipt of the requested information, the Board does not pass on the merits of a union's claims (Island Creek Coal Co., 292 NLRB 480 (1989)) and whether a grievance is time barred is for an arbitrator to decide. An employer must provide information that is even potentially relevant. United States Postal Service, 303 NLRB 502, 508 (1991).

The Union's information request was also based on considerations apart from the adjustment of past discipline of unit employees and the consideration of future grievances. The Union had told the Employer that the effectiveness of the safety policy was at stake because of the Union's inability to demonstrate to unit employees that they were being treated fairly under the policy. The Union also argued that it had a legitimate interest in representing unit employees regarding workplace safety and asserted that the work place was arguably less safe if the Employer was not actually disciplining supervisors. In this connection, it was noted that the Employer had invited the Union to participate in the administration of the safety program as members of a plant safety committee.

In all the circumstances, therefore, we authorized issuance of an 8(a)(1) and (5) complaint.

Insistence Upon Illegal Subject

We considered whether a federal contractor's insistence upon a 12-hour work day, in the face of an applicable federal statute limiting work to eight hours per day, constituted insistence upon an illegal subject for bargaining in violation of Section 8(a)(5) of the Act. We concluded that the Employer had acted unlawfully by insisting on including a provision in the collective bargaining agreement which was in contravention of federal law.

Pursuant to the Mineral Lands and Mining Act of 1920, which is applicable to the Employer's operations, each federal lease issued by the Department of the Interior must contain a provision for the observance of prescribed rules, "including a restriction of the work day to **not exceeding eight hours** in any one day for underground workers except in cases of national emergency." 30 U.S.C. Section 187. (Emphasis added.) The Employer's 20-year lease extension, entered into in 1990, included this required provision.

In November 1994, the Employer sought a waiver of the eight-hour workday restriction from the Bureau of Land Management (BLM). BLM refused to grant the waiver request, stating that it had no authority to remove the eight-hour workday stipulation, and referred the matter to the Department of Labor (DOL), claiming that "labor issues" were the responsibility of the DOL under the Mine Safety and Health Act (Mine Act). A DOL official subsequently advised the Union that 30 U.S.C. Section 187 had not been repealed and was not in conflict with the Mine Act.

During negotiations for successor collective bargaining agreements, the Employer insisted that the two Unions representing its mining and maintenance employees accept a provision for a 12-hour schedule for unit employees. The parties failed to reach agreement and upon expiration of the existing agreements, the Employer locked out all of its bargaining unit employees. The lockout subsequently ended under the terms of an interim agreement.

We concluded that the Employer had violated Section 8(a)(5) of the Act by insisting on an illegal subject of bargaining. The Employer's insistence on a 12-hour schedule proposal, which was in direct conflict with federal statutory language, constituted an unlawful demand and the Employer, thus, was not privileged to insist to the point of impasse upon its inclusion in the collective bargaining agreements.

In Southern Steamship Company v. NLRB, 316 U.S. 31, 47 (1942), the Supreme Court stated:

[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important congressional objectives. Frequently, the entire scope of congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Thus, the Board endeavors to accommodate its statutory objectives to other statutory or legal schemes. As the Board stated in BASF Wyandotte Corp., 274 NLRB 978, 979 (1985), enfd. 798 F.2d 849 (5th Cir. 1986):

in considering whether a party has violated Section 8(a)(5) or 8(b)(3) [the Board] has authority to entertain arguments that an unfair labor practice was, or was not, committed because certain contract provisions or practices in issue violate [another statute] and thus constitute illegal subjects of bargaining.

This approach avoids the risk of placing a party in the position of attempting to comply with conflicting statutory mandates. See also, National Fuel Corp., 308 NLRB 841, 843 (1992); Hughes Tool Co., 147 NLRB 1573 (1964) (contract clauses that discriminated on the basis of race violated 8(b)(1)(A), (2) and (3)); ABC Prestress & Concrete, 201 NLRB 820, 825 (1973) (strikers seeking higher pay had lost their protected status because the object of the strike was to require the respondent to pay retroactive or current wage increases that would have been in violation of the Economic Stabilization Act); and Stein Printing, 204 NLRB 17, n. 2 (1973) (employer did not violate Section 8(a)(5) by refusing to sign an agreement containing a provision in direct contravention of a state law, and the union's insistence on such provision violated 8(b)(1)(B)).

In Washington Employers, Inc., 200 NLRB 825, 826 (1972), the Board, in finding that the respondent employer had violated Section 8(a)(5) by refusing to implement negotiated wage increases, rejected the respondent's claim that it could not implement such wage increases without prior approval from another federal agency. In order to reach its conclusion, the Board solicited an opinion from the concerned agency, which found that respondent's interpretation of the law was in error. Similarly, here, we administratively determined, through contacts with DOL and BLM, that while not the subject of much regulation or litigation, 30 U.S.C. Section 187 is still valid law. In this regard, we noted that the 20-year lease that the Employer entered in 1990 contains specific language concerning the 8-hour restriction, and that BLM specifically refused to grant the waiver requested by the Employer. In these circumstances, we concluded that the 12-hour shifts proposal violated the federal statute and that the Employer had engaged in bad faith bargaining by insisting to impasse on inclusion of such proposal in the collective bargaining agreement.

Our decision does not impose a penalty on the Employer for violating 30 U.S.C. Section 187, nor does it otherwise constitute an effort to enforce that statute. The decision only addresses the Employer's failure to meet its bargaining

obligations under the Act. See, National Fuel Corp., 308 NLRB, supra at 843 (1992), in which the Board acknowledged that it did not have the authority to enforce Section 302 of the Taft-Hartley Act but, if necessary, could decide whether contract provisions violated that Section "in the course of determining whether an unfair labor practice has occurred."

In view of our conclusion that there was no valid impasse, we also concluded that the Employer had violated Section 8(a)(5) of the Act by locking out unit employees and by implementing the interim agreement. It is well established that a lockout in support of bad faith bargaining positions is unlawful regardless of whether an impasse was reached. Union Terminal Warehouse, 286 NLRB 851 (1987); accord, Greensburg Coca Cola Bottling Co., 311 NLRB 1022 (1993), rev'd on other grounds 40 F.3d 669 (3rd Cir. 1994).

Duty to Bargain in Reopened Facility
Formerly Part of Multi-Facility Unit

In one case we considered whether the Employer violated Section 8(a)(1) and (5) when it refused to recognize and bargain with the Union with respect to a newly reopened facility which had been part of a multi-facility bargaining unit prior to a hiatus in operations at that facility.

The Union had represented the employees at four Employer-operated facilities in a single, multi-facility bargaining unit for several years. In late 1991 or early 1992, the Employer closed two of the facilities and leased a third to another company for economic reasons. The parties expected the shutdown of operations to be permanent, and the bargaining unit employees were either transferred to other facilities or terminated. The Employer continued to recognize the Union as the representative of the employees at its remaining facility, but the lessee operated the leased facility with its own non-union work force.

After three and a half years, the lessee terminated its lease and the Employer resumed operations at the leased facility. The Employer hired the former, unrepresented employees of the lessee and refused to recognize the Union at the newly reopened facility absent a showing of majority support among the employees at the facility.

There was no evidence that the Union enjoyed majority support among the employees at the newly reopened facility; nor was there any evidence that the Employer had based its hiring decisions on unlawful considerations. In addition,

there was no evidence that the employees at the newly reopened facility and the employees at the Union-represented facility would constitute a single bargaining unit under the principles of accretion. Rather, the Union claimed that the Employer was required to recognize and bargain with it at the newly reopened facility because the facility had been part of the multi-facility bargaining unit at the time of the shutdown.

We determined that the scope of the bargaining unit had become limited to the single remaining facility as a result of the lengthy hiatus in Employer's operations at the leased/closed facilities and therefore the Employer was not required to recognize and bargain with the Union at the newly reopened facility. We noted that the shutdowns were intended to be permanent and that the bargaining unit employees had no reasonable expectation of recall. Thus, it appeared that the Employer could have had the multi-facility unit clarified to exclude the closed/leased facilities had it filed a unit clarification petition during the shutdown. See New York Trap Rock Corp., 285 NLRB 1009 (1987).

More importantly, in Sterling Processing Corp., 291 NLRB 208 (1988), the Board held that there is no presumption that post-hiatus employees will support a union in the same ratio as pre-hiatus employees where there is a lengthy hiatus in operations like the one in this case. Had the leased facility, like the facility in Sterling Processing Corp., constituted a separate bargaining unit prior to the shutdown, the Employer clearly would have had no obligation to bargain with the Union upon reopening. The fact that the leased facility had been part of a multi-facility unit at the time of the shutdown would not warrant a contrary result. We noted that where facilities are geographically separated, a separate bargaining unit is usually the appropriate unit and the integration of a new facility into an established unit is generally based on principles of accretion designed to protect the Section 7 right of employees to select their own representative. Any interests which the bargaining unit employees might have in transferring or bumping into the newly reopened facility were outweighed by the interest of the employees at the new facility in having a voice in the selection of their bargaining representative.

Delivery Drivers as Employees in the
Building and Construction Industry Under Section 8(f)

One case involved whether the Employer's drivers performed sufficient construction work within the meaning of Section 8(f) to make lawful their representation by the Union on a Section 8(f) pre-hire basis.

The Employer owned and operated a rock quarry, a sand and gravel pit, and an asphalt plant. Historically, it had also operated as a contractor performing road and highway construction. The Union had represented the Employer's drivers who had been employed during the peak of the construction season. The Union had never been certified as the representative of the drivers, nor was there any evidence that the Union ever achieved majority support in the unit. The parties' multi-employer collective bargaining agreement was an area construction industry agreement with a 7-day union security clause.

The Employer's drivers hauled sand and gravel from the Employer's pit, and hauled rocks from its quarry to its asphalt plant. When the Employer sold its sand, gravel, rocks, and asphalt to third party customers, delivery was arranged by those customers and did not involve the Employer's vehicles or drivers. In the winter, the Employer's drivers delivered the sand used by the state for road sanding.

The Employer also used its plant's asphalt in its road and highway construction operations. The Employer's drivers hauled this asphalt from the Employer's plant to the jobsite where the drivers would then empty the asphalt into a paver as it paved the road. This was the only regular work which the Employer's drivers ever performed in connection with the Employer's highway construction operations. The parties disputed whether this constituted "construction work" within the intent of Section 8(f). It was undisputed, however, that on infrequent and irregular occasions the Employer's drivers moved a pile of material from one location on the jobsite to another, and that this work did constitute construction work within the meaning of Section 8(f).

Every year most of the Employer's drivers were laid off by the close of the construction season in the late fall. The Employer recalled the drivers at the resumption of the construction season in the following March or April. Typically, a few drivers were kept working on and off over the winter in connection with such things as the Employer's contracts to provide sand for road sanding.

We decided to dismiss the Section 8(a)(5) charge because the Employer's drivers were not engaged in the building and construction industry under Section 8(f) of the Act and therefore the Union's representation of them pursuant to a pre-hire 8(f) contract was unlawful because of the Union's lack of majority status. See Brannan Sand & Gravel Co., 289 NLRB 977, 979.

Section 8(f) states in relevant part: "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members...." Thus, the 8(f) statutory requirements are that the agreement:

- 1) must cover employees who are engaged in the building and construction industry;
- 2) must be with a union of which building and construction employees are members; and
- 3) must be with an employer engaged primarily in the building and construction industry.

See Animated Displays Company, 137 NLRB 999, 1020-1021 (1962) and Carpet, Linoleum and Soft Tile Local Union No. 1247 (Indio Paint and Rug Center), 156 NLRB 951 (1966).

With regard to requirement 2, the Union clearly had members who were employed as building and construction employees. With regard to requirement 3, we decided that there was insufficient evidence to resolve this question. It seemed clear that the Employer's sand and gravel pit, rock quarry, and asphalt plant operations were material supply operations which did not qualify as "the building and construction industry" within the meaning of 8(f). Forest City/Dillon-Tecon, 209 NLRB 867, 870-872 (1974). Also, the deliveries which the Employer's drivers made from its pit and quarry to its asphalt plant, from the asphalt plant to the Employer's customers, and the deliveries of sand to the road sanding operations of the state, which were themselves not engaged in the building and construction industry, clearly did not constitute construction work within the meaning of 8(f). J. P. Sturuss Corp., 288 NLRB 668 (1988); St. John Trucking, 303 NLRB 723 (1991). However, the Employer was also engaged to some degree in the building and construction industry with regard to its road and highway operations. What was not clear was whether those

operations, the road and highway construction, rendered the Employer "primarily engaged" in the building and construction industry.

We decided that it was unnecessary to finally resolve this question because requirement 1 - that the employees covered by the Union's collective-bargaining agreement must be engaged in the building and construction industry - had not been met so 8(f) was not applicable.

Research uncovered no cases specifically defining what is required for employees to be in the construction industry within Section 8(f). However, a number of Section 8(e) cases hold that the drivers in the instant case were not performing "construction-site work" within the meaning of Section 8(e). In Island Dock Lumber, Inc., 145 NLRB 484 (1963), the Board determined that the delivery of ready-mix concrete does not come within the construction industry proviso of 8(e). The Board noted that the pouring of concrete merely constituted the final act of delivery because concrete by its very nature cannot be dumped on the ground at the construction site like other materials. The asphalt in our case was like concrete in this regard. See also Local 294 Teamsters (Rexford Sand and Gravel Co.), 195 NLRB 378 (1972), (dumping of sand on construction site constituted delivery and not construction work within 8(e).

In Island Concrete Enterprises, 225 NLRB 209 (1976), the Board held that the transportation and delivery of ready-mix concrete, and of precast concrete pipe for manholes, constituted the transportation and delivery of supplies, materials, or products, and was not work to be performed at the site of construction as contemplated by 8(e). The Board found that the delivery of the precast concrete pipe was not construction site work even though that work involved the lowering of the sections of pipe and the placing of the pipe segments in position in the trench by the operation of a boom. Certainly, compared to these cases, the work performed in our case by the asphalt delivery drivers also would not be considered job-site construction work under Section 8(e) of the Act.

Turning to 8(f), as opposed to 8(e) cases, the Board in J. P. Sturris Corporation, 288 NLRB 668 (1988), held that an Employer which operated a quarry, batch plant, and delivery service for redi-mix concrete was not in the building and construction industry within the meaning of 8(f), even though its drivers occasionally would assist the contractor at the construction site with screening and spreading of the concrete whenever the contractor's own employees were

unavailable. The Board held that these incidental tasks did bring the Employer within the ambit of 8(f). The ALJ, who was affirmed by the Board with some modifications in other respects, cited Island Concrete Enterprises, supra, and Island Dock Lumber Co., supra, for the proposition that redi-mix concrete delivery companies are not engaged in the building and construction industry within the meaning of either 8(e) or 8(f) of the Act. This portion of the ALJ's decision was not modified in any way by the Board even though, as noted in the discussion of those cases above, both were 8(e), not 8(f), cases. Thus the Board in Sturrus found that such an employer was not engaged in the building and construction industry within the meaning of 8(f).

Accordingly, work at a construction jobsite by unit employees is a necessary element for a finding of 8(f) applicability. Here, there could be no such finding of jobsite work by the unit employees, the drivers, in view of cases such as Island Dock and Island Concrete. Moreover, the infrequent and irregular work of moving some materials from one part of a jobsite to another could not be considered sufficient to have made these drivers construction employees.

Since the relationship between the Employer and the Union was not within 8(f), the Union had to establish majority standing to establish a 9(a) relationship. See Brannan Sand & Gravel Co., supra. However, the Union had never been certified nor did it appear that the Employer ever recognized the Union as anything other than an 8(f) representative. Accordingly, we decided to dismiss the charge.

UNION COERCION

Union Flyers Inviting State Labor Complaints Constituting Unlawful Vote Buying

In one case, we considered whether, before a Board conducted election, the Union's distribution of flyers inviting employees to file state labor complaints against the Employer constituted the providing of free legal advice and thus coercive vote buying.

The Union had lost a Board election, filed no objections, and the election case was closed. However, a few days before that case closed, the instant charge was filed concerning Union flyers distributed prior to the election.

The Union's flyers stated that the Employer's old holiday policy had unlawfully failed to pay overtime, and that employees could collect back overtime payments for the prior three years. The flyers invited employees to complete a state Labor Standards Complaint form which was attached to the flyers. The flyers also stated that employees could contact the Union for information or help.

We decided to dismiss the charge because the Union's flyers did not unlawfully coerce the employees into voting for the Union.

In Nestle Dairy Systems, 311 NLRB 987 (1993), enf. den. 46 F.3d 578 (6th Cir. 1995), on the night before a Board election, the union announced the filing of a \$20 million suit against the employer. The union said that its suit might collect \$35,000 for each employee, although it would be a "long and difficult battle." The union then stated that it had filed the suit on behalf of the employees who should therefore support the union. The employer filed election objections alleging that the union's providing of legal representation and promising of a possible lawsuit award was the conferral of a substantial and direct benefit affecting the election vote. The Board rejected this election objection noting, among other things, that the filing of the suit involved minimal cost, that the suit's outcome was uncertain and remote, that the possibility of employee awards was not a promise or a gift, and that public policy must allow parties to seek redress on behalf of employees. See also House of Raeford Farms, Inc., 317 NLRB No. 18 (1995) involving the dismissal of a similar election objection.

We decided that the Union flyers in our case were far less egregious than the union conduct in Nestle Dairy. We noted, however, that Nestle Dairy involved an election objection, while our case involves a Section 8(b)(1)(A) charge requiring the finding of "coercion." In our view, the instant flyer was a form of handbill and not coercive. See Hospital and Service Employees Union, Local 399 (Delta Air Lines), 293 NLRB 602 (1989) finding even untruthful union handbilling not "coercive", relying on DeBartolo Corp. v. Florida Coast BCTC, 485 U.S. 568 (1988).

We distinguished Gregg Industries, 274 NLRB 603 (1985), where the Board concluded that union preelection conduct objectionable under Savair should also be a violation of Section 8(b)(1)(A). See NLRB v. Savair, 414 U.S. 270 (1973). However, the Board in Gregg Industries specifically

found that a Savair waiver of initiation fees for only employees joining before the election was "coercive" within Section 8(b)(1)(A), because it amounted to "threats of exacting higher fees later when maintenance of membership may be a condition of employment." Id at 605. In contrast, instant Union flyers here merely disseminated information and could not be fairly characterized as "threats".

Finally, we distinguished Board cases involving preelection payments by unions to employees as coercive vote buying. In Flatbush Manor Care Center, 287 NLRB 457 (1987), the Union violated Section 8(b)(1)(A) by paying money to employees during the pre-election campaign period, claiming that the payments were to supplement salaries or for lunch and carfare. The Board reasoned that because "a large number of employees were given the impression...that the supplement to their wages would continue if [the union were] selected...." the payments "tended to restrain and coerce the employees from voting against [the union]." In clear contrast, the instant case does not involve the direct payment of money or even the promise of direct payments of money from the Union.

Accordingly, we decided that the instant Section 8(b)(1)(A) charge should be dismissed.

Photographing Employees in Rally On Day of Board Election

In one case we considered whether the Union had restrained and coerced employees in violation of Section 8(b)(1)(A) when a Union organizer photographed certain employees on the day of a Board election.

The Employer was the subject of a nationwide organizing campaign by the Union, and a Board election was scheduled for one of the Employer's facilities. On the day of the election, a group of employees from some of the Employer's other facilities conducted a "Vote No" rally at the facility where the election was taking place. A Union organizer took pictures of the employees who participated in the rally. The Union organizer also appeared to be photographing local employees standing outside the doorway which led into the polling area. These employees were not participating in the "Vote No" rally; nor were they standing with employees who were participating in the rally. Although the Union claimed that it was taking pictures for the purpose of establishing that the Employer was allowing campaigning to occur within 50 feet of the polling area, neither the Union organizer nor

any other Union representative explained the purpose of the photographs to the employees.

We concluded that the Union had violated Section 8(b)(1)(A) of the Act by photographing the employees who were participating in the "Vote No" rally. However, inasmuch as the local employees were not engaged in activities protected by Section 7 of the Act or other activities which would tend to indicate their sentiments about the Union, the photographing of those employees was not unlawful.

Pursuant to Section 8(b)(1)(A), it is an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act. Section 7 provides that employees have the right to engage in union or other protected concerted activity as well as the right to refrain from engaging in such activity.

In Pepsi-Cola Bottling Co., 289 NLRB 736 (1988), the Board set aside an election where, during a rally on the day prior to the election, a union agent videotaped at least two employees as they were handed handbills upon leaving the employer's premises. The Board determined that "the videotaping intruded on the employees' Section 7 right to refrain from any or all union activities, including the union rally then in progress," because "[a]bsent any legitimate explanation . . . employees could reasonably believe that the Union was contemplating future reprisals against them." Id. at 737. The Board found that such videotaping was "intimidating" and that it "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." Id. at 736-737. While Pepsi-Cola Bottling Co. was concerned only with whether the videotaping constituted objectionable conduct which would warrant setting aside an election, the Board's references to "intimidation" and the absence of a "free and uncoerced choice" support the conclusion that such conduct would also violate Section 8(b)(1)(A). See Mike Yurosek & Son, Inc., 292 NLRB 1074 (1989) (The Board found that the photographing of employees while they engaged in campaign activity constituted objectionable conduct, relying in particular on the absence of any explanation to employees as to why their pictures were being taken as well as a threatening remark by the union agent.) Cf. Nu Skin International, Inc., 307 NLRB 223, 224 (1992) (Photographing employees who voluntarily attended a union-sponsored picnic did not reasonably suggest a retaliatory purpose and, thus, did not constitute

objectionable conduct which would warrant setting aside an election.)

In Auto Workers Local 695, (T.B. Wood's), 311 NLRB 1328, 1336 (1993), the Board affirmed an Administrative Law Judge's determination that the union had restrained and coerced employees in violation of Section 8(b)(1)(A) when its agents gave the appearance of photographing or videotaping employees on numerous occasions as they crossed a picket line. The ALJ found that the union agents engaged in this activity as "a means of instilling fear of retribution in the minds of replacement workers and/or others who did not support the strike." Similarly, in Meat Packers (Hormel & Co.), 287 NLRB 720, 733 (1987), it was determined that the union had violated Section 8(b)(1)(A) when a union agent photographed employees entering an organizing meeting conducted by a rival union since "[t]he natural inference to be made by the subjects of the photographs was that they were being targeted for retaliation." While the union agents in both cases had engaged in other unlawful conduct, that fact was not mentioned in the rationale for finding that the videotaping and/or photographing was unlawful.

The essential consideration in cases in which a union has photographed and/or videotaped employees or has otherwise attempted to identify employees in the context of their Section 7 activities is whether the union was making a record of which employees did or did not support the union. In cases in which the Board has found that a union engaged in objectionable conduct and/or violated Section 8(b)(1)(A), the photographs or videotapes would have indicated whether or not the employees supported the union. For example, when a union establishes a traditional picket line and seeks to induce employees to refuse to cross the line, those who oppose the union's efforts are readily identifiable by their refusal to honor the picket line. By videotaping and/or photographing employees as they cross such a picket line, the union makes a record of the employees who oppose its efforts and the "natural inference" is that the union intends to retaliate against those employees. See, e.g., Auto Workers Local 695, (T.B. Wood's), supra.; Meat Packers (Hormel & Co.), supra. A similar analysis applies to photographing or videotaping the distribution of handbills to employees as they enter or leave an employer's premises. In that situation, union supporters and opponents can be differentiated by whether they accept or decline the handbills. See, e.g., Pepsi-Cola Bottling Co., supra. Conversely, where a union does not engage in conduct that elicits a show of support for the union and the employees

are not otherwise engaged in Section 7 activities which would indicate whether they support the union, no "natural inference" of retaliation would arise from videotaping and/or photographing those employees. In such circumstances, the videotaping or photographing of employees would not constitute objectionable conduct or an unfair labor practice. Cf. Nu Skin International, Inc., *supra*.

The employees who were merely standing near the door to the polling area were not engaged in any activities protected by Section 7; nor were they engaged in other activities which would tend to indicate whether they supported the Union. Under these circumstances, photographing those employees would not raise a "natural inference" of retaliation and was not unlawful. However, by photographing the employees who participated in the "Vote No" rally, an activity protected by Section 7 of the Act, the Union was making a record of those employees who did not support the Union's organizing efforts. Photographing the rally, without any explanation to the employees, resulted in the "natural inference" that the Union intended to retaliate against those employees for their opposition to the Union and constituted restraint or coercion within the meaning of Section 8(b)(1)(A). Accordingly, we authorized issuance of a complaint alleging that the Union restrained and coerced employees in violation of Section 8(b)(1)(A) when the Union organizer photographed employees who were participating in the "Vote No" rally.

Union Lawsuit To Collect Union Dues Where Bargaining Agreement Not in Effect

In another case, we considered whether a union acted unlawfully by filing a lawsuit to collect dues from a financial core member during a time when there was no collective bargaining agreement in effect.

The Employer and Local Union A had been parties to a collective bargaining agreement which expired in July 1993. The parties entered into a subsequent agreement which was effective from March 9, 1994 to March 31, 1996. Pursuant to the agency shop provision of the agreement, all employees were required to pay monthly union dues as a condition of employment. The provision also provided for payment of dues by payroll deduction. The payroll deduction form signed by employees expressly prohibited deductions for any pay period unless, for some portion of that pay period, there was a collective bargaining agreement in effect between the Union and the Employer.

The charging party employee was initially hired into a unit represented by local B. The employee signed a payroll deduction form in 1988 for union dues to be paid to local B, only because it was required by the contract. Subsequently, the employee was transferred to the unit represented by Local A. The employee did not sign a payroll deduction for Local A, but the Employer continued deducting dues from the employee's paycheck, which were then paid to Local A.

During the contract hiatus period-July 1993 to March 1994-the Employer suspended all dues deductions and the charging party, among others, failed to pay dues directly to the Union. In December 1994, the employee was sued in state court by Local A for non-payment of monthly membership dues from August 1993 through December 1993. At a hearing on the matter, the employee denied having ever been a member of the Union. The state court judge, however, found in favor of the Union and ordered the employee to pay the back dues. On appeal from the state court decision, the employee again argued that she had never attended any meetings, voted in any elections or signed anything indicating that she wanted to become a member. The Union presented evidence indicating that the employee had voted in an election. The court again ruled in favor of the Union.

We concluded that there was insufficient basis to establish that the employee had become a member of the Union. There was no evidence that the employee ever actually enrolled as a member of the Union or even attended any Union meetings. The fact the employee signed the payroll authorization form and received Union literature was not sufficient to make her a member of the Union; nor was the fact that she had voted on a contract ratification, especially in light of the fact that the contract she voted on was applicable to her at the time. Additionally, under the National Labor Relations Act, a union security provision can require the payment of initiation fees and dues but cannot require one to become a union member. See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967). As the Supreme Court stated in NLRB v. General Motors Corp., 373 U.S. 734, 742 (1962), "membership as a condition of employment is whittled down to its financial core."

We noted that it is a violation of the Act to bring a lawsuit for "an objective that is illegal under federal law or which is pre-empted by the Board's jurisdiction." Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 737 n. 5 (1983). The collective bargaining agreement which required the payment of dues as a condition of employment expired on

July 1, 1993. Since the employee's checkoff authorization, on its face, was not valid in the absence of a contract and could not be construed as evidencing an intent to join the Union, that authorization did not create any dues obligation during the contractual hiatus period. In the absence of an enforceable dues obligation, the Union's lawsuit against a financial core member for the recovery of dues was deemed to constitute a lawsuit based on an illegal objective.

Accordingly, it was concluded that the Union unlawfully restrained and coerced the employee in the exercise of her statutory right to not financially support the Union.

Identifying the Section 9(a) Representative

Another case involved whether we should have issued complaint alleging that the International, the District Lodge and Local Lodge violated Section 8(b)(1)(A) of the Act in circumstances where it was unclear who was the Section 9(a) representative of the employees in the case.

The Regional Office was unable to obtain evidence of which union body had been certified as the Section 9(a) representative of the employees back in 1945. Unfortunately, the Unions themselves would not take a position on the identity of the 9(a) representative.

The collective-bargaining agreement was entitled "Labor Agreement: [the Employer], the International Union and its Lodge A, District B." The bargaining agreement preamble stated: "Agreement entered into...by and between [the Employer] and Lodge A of the International, District B (hereafter designated as the 'Union')..." The caption over the Union's signature lines at the end of the bargaining agreement stated "International, District B." The agreement was signed by the Employer and an individual who signed over a line entitled "International representative" even though that individual was actually the District representative. This individual also signed supplemental agreements attached to the bargaining agreement. On those supplemental agreements, this individual included the initials "DBR" after his name, indicating his status as District representative. He had not included the DBR initials when he had signed the main contract as an agent of the International. Finally, the bargaining agreement was also signed by the President and Vice President of Local A.

Negotiations were conducted for the Union by the District representative and the Local Union President. The

second step of the grievance procedure also involved the District representative and the Local President both of whom also attended Union arbitrations as witnesses.

The Union Constitution granted significant control to the International over the District and Local. For example, the Grand Lodge Representative was the supreme head of the Local Lodge. The International also could waive Local Lodge dues and could establish trusteeships and suspend officers and members of the Local Lodge. The International kept account of all financial transactions between the Grand Lodge and the Local Lodges and could audit the Local's books at any time. Finally, the International was required to authorize any strike by the Local and to approve all Local by-laws, and the District Lodge was a delegate body comprised of Local Lodges within an industry.

We decided to allege that the Local, the International and the District were each individually and/or collectively the Section 9(a) representative, and were therefore jointly and severally liable for the Local Union's Section 8(b)(1)(A) violation.

There was evidence that all three labor organizations were intimately involved in representing the unit employees. First, the title page of the bargaining agreement stated that it was between the Employer and the International and its Lodge A, District B, and the preamble stated that the agreement was between the Employer and Lodge A, District B. Second, the bargaining agreement contained signatures of representatives from all three entities. Finally, the Union constitution granted significant control to the International and the District over the Local.

Our conclusion to allege joint and several liability was consistent with the Board's decision in Steelworkers Local 15167 (Memphis Folding Stairs, Inc.), 258 NLRB 484 (1981). There, the Board rejected the union's affirmative defense that the complaint failed to set forth which labor organization, the Steelworkers or the Local, was the properly designated respondent. In rejecting that defense, the ALJ, with Board approval, held that respondent was properly identified in the complaint by relying on the fact that the complaint allegations were similar to the language set forth in the collective-bargaining agreement: "the collective-bargaining agreement in existence at material times...uses language similar to that set forth in the complaint...[and] states that the agreement is between the Employer and 'the United Steelworkers of America, AFL-CIO-CLC, on behalf of LU 15167.'" Id at 485, note 1. The ALJ

also relied on the fact that representatives of both the Local and the International had been involved in the grievance proceedings.

Here, as in Memphis Folding Stairs, naming the Local, the District, and the International was consistent with the language set forth in the bargaining agreement. All three entities were named on either the cover page, the preamble, or the signature pages of the main or supplemental agreements. And both the Local and District were involved in grievance processing.

Based on the above, we decided that, although there was no evidence as to whom the Board certified back in 1945, there was sufficient evidence to allege that the Local, the District and the International were each individually or collectively the Section 9(a) representative and therefore jointly and severally liable for the Local's Section 8(b)(1)(A) violation.

Denial of Union Membership
Because of Internal Union Activity

Another case involved whether the Union unlawfully denied membership to a unit employee because she had previously engaged in internal Union activity while still a member.

Charging Party Union member A resigned her Union membership in mid-1995 because of her displeasure with the Union President. In November 1995, member A changed her mind and reapplied for membership. Her application for membership was actively opposed because of her prior internal activity. For example, the Union's Financial Secretary opposed member A's application stating that she had been a "troublemaker in the local for several years", and "her complaints would have less credibility with the membership" if she were kept out of the Union.

In fact, from 1991 - 1995, member A's dissident internal Union activity had included:

- 1) circulation of petitions requesting the resignation of the President;
- 2) supporting another member's lawsuit against the Union;
- 3) testifying at a Union trial board proceeding against another member;

- 4) complaining to the International about the President;
- 5) circulating a petition critical of the Union's late notice to stewards concerning training; and
- 6) making statements critical of the President's choice of Executive Board members.

The Union did not contend that member A had ever violated any provision of its constitution or bylaws, or engaged in any other activity that would clearly have warranted denial of membership, such as the filing of a decertification petition. See, e.g., Tawas Tube Products, Inc., 151 NLRB 46 (1965) (lawful expulsion of member for filing decertification petition). The Union also admitted that in its entire history, member A was the only employee who had ever been denied membership.

We decided that the Union denied member A membership in unlawful retaliation against her prior, protected intra-union activity.

In CWA Local 1104 (New York Telephone Co.), 211 NLRB 114 (1978), enf'd. 520 F.2d 411 (2d Cir. 1975), the Board and court found a violation of Section 8(b)(1)(A) where a union denied membership to employees who crossed the union's unlawful picket line. The Board and court relied upon the Supreme Court's opinion in Scofield v. NLRB, 394 U.S. 423, 430 (1969), where the Court stated:

"Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has embedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule."

In CWA Local 1104, the union's conduct clearly reflected no legitimate interest and impaired an established labor law policy because the union had acted against employees who had refused to honor an unlawful picket line.

Similarly, in Teamsters Union Local No. 287 (Emery Air Freight/Airborne Express), 304 NLRB 119 (1991), the Board adopted an ALJ who applied a Scofield analysis to find that a union violated Section 8(b)(1)(A) by involuntarily withdrawing an employee's membership because of his internal union politics. The ALJ noted: "It is well settled that a union cannot discriminate against [an employee] because of his internal union activities," citing Laborers Local 383 (Arizona Bldg. Chapter, AGC), 266 NLRB 934 (1983), and

Carpenters Local 22 (Graziano Constr. Co.), 195 NLRB 1 (1972). Thus, the Board and the Second Circuit Court of Appeals have made clear that it is appropriate to apply a Scofield analysis to a Union's denial of, or expulsion from, membership.

In our case, it seemed clear that the Union denied member A membership in express retaliation against her prior internal union activity. Under the test in Scofield, the Union could have denied member A membership based upon a "legitimate union interest" which "impairs no policy embedded in the labor laws." However, since the Union's denial was based upon member A's protected conduct, that denial was unlawful as not based upon any legitimate interest. Since our case did not involve a union's right to exclude an individual from membership for a valid reason, cf., Tawas Tube Products, supra, we decided to issue complaint against the Union's conduct.

UNION REFUSAL TO BARGAIN

After-Acquired Clause Provisions As Nonmandatory Subjects of Bargaining

In one Section 8(b)(3) case, we decided novel questions concerning bargaining about "after-acquired" clauses and other proposals which were intended to facilitate union organizing.

The Employer had a long-term collective bargaining relationship with the Union covering a unit of hotel service employees. After the most recent collective-bargaining agreement expired, the Employer began bargaining as part of a multi-employer group. The Employer later withdrew from the multi-employer group and continued negotiations with the Union on an individual basis, ultimately accepting most of the Union's proposed contract terms. However, the Employer indicated that it was opposed to a proposed "neutrality clause" that would extend the contract to the Employer's new facilities on the basis of a check of union authorization cards.

The neutrality clause further obliged the Employer to take a "positive" approach to Union organizing efforts at the Employer's new or after-acquired operations. Thus, the Employer was asked to agree to provisions stating that it would not make any statements or imply any opposition to employee selection of a union, that it would give the Union

access to its facility to the extent permitted by the Employer's solicitation rules, and that it would furnish the Union with a complete list of the names and addresses of unit employees.

The Employer refused to agree to the neutrality clause. The Employer instead offered to , and subsequently did, implement the multiemployer unit's economic offer to the Union if it would agree to a contract without the neutrality clause. The Union rejected the Employer's offer and insisted to impasse on a contract containing the provisions described above.

The Union noted that several other employers in the area had agreed to the neutrality clause conditioned upon the adoption of the clause by all the other area employers. The Union asserted that these other employers would refuse to enforce the neutrality clause should the Employer decline to agree to one. Similarly, at least four of the signatory employers negotiated a "most favored nations" clause which, according to the Union, would further give the signatory employers the right to ignore the neutrality clause should the Employer reject a similar provision.

In evaluating the Section 8(b)(3) charge, we decided that the Union's insistence to impasse on the after-acquired clause was not unlawful because it involved a mandatory subject of bargaining. Nonetheless, we decided to issue complaint alleging that the Union unlawfully insisted to impasse on three permissive subjects of bargaining encompassed by the neutrality clause, i.e., requirements that the Employer refrain from making statements concerning Union organizing campaigns, that the Employer provide the Union with lists of non-unit employees' names and addresses, and that the Employer provide the Union with access onto its property in order to organize its employees. However, we directed the Region to argue that the better view is that the last two proposals, i.e., those relating to the employee roster and access, when coupled with the after-acquired clauses, are mandatory subjects concerning the implementation of the after-acquired clauses and, therefore, that the Union's insistence on these two proposals was lawful.

In NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 349 (1958), the Supreme Court held that a party may insist to impasse only with respect to mandatory subjects of bargaining and that insistence to impasse on a permissive subject violates the statutory duty to bargain in good faith. Mandatory subjects involve only those issues

which settle an aspect of the relationship between the employer and its employees. Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division, 404 U.S. 157 (1971). Although matters involving individuals outside the employment relationship do not generally fall within that definition, the Court recognized that they are not wholly excluded. The touchstone in such cases is "not whether the third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitally affects the 'terms and conditions' of their employment." Id. at 179.

We initially decided that the after-acquired clauses in this case were like the mandatory clauses in Houston Division of the Kroger Company, 219 NLRB 388 (1975), rather than permissive application of contract clauses, as in United Mine Workers (Lone Star Steel), 231 NLRB 573 (1977), enf. den. in pert. part 639 F.2d 545 (10th Cir. 1980), since, like the employees who were the subject of the clause in Kroger, newly-organized employees at a new Employer facility would be absorbed into the existing bargaining unit. Also, the after-acquired clause here clearly did not contemplate the extension of the contract to other operations or employees other than the types of employees covered by the current unit.

We further decided that the after-acquired clause was mandatory under a second theory, specifically that the clauses are so intertwined with the terms and conditions of unit members' employment as to take on their mandatory nature. In Sea Bay Manor Home, 253 NLRB 739 (1980), enf'd mem. 685 F.2d 425 (2d Cir. 1982), the Board held that an employer violated Section 8(a)(5) and (1) of the Act by refusing to abide by a stipulation agreement to submit the contractual terms under negotiation to interest arbitration. After considerable bargaining over mandatory subjects, the parties had voluntarily agreed to resolve their remaining differences by interest arbitration. Under the particular circumstances presented, the Board held that the stipulation agreement to submit to interest arbitration was tantamount to a collective-bargaining agreement between the parties. The agreement to arbitrate "was so intertwined with and inseparable from the mandatory terms and conditions for the contract currently being negotiated as to take on the characteristics of the mandatory subjects themselves." Id. at 740.

Similarly, in this case, the after-acquired clause served as a mechanism to determine terms and conditions of employment. Thus, when the Union establishes a card

majority at a new facility, the after-acquired clause effectively resolves all mandatory subjects of bargaining by absorbing new employees into the existing bargaining unit and applying the contract to them.

The neutrality clauses connected to the after-acquired clause included provisions which aided the Union in organizing unrepresented employees. The questions of whether each of these provisions can be deemed permissive or mandatory (and thus whether the Union could lawfully insist to impose on them) were of first impression. We reached the following conclusions about these provisions:

We concluded that the Union could not lawfully insist to impose on that portion of the neutrality clause that requires the Employer to waive its Section 8(c) right to voice an opinion about the Union's organizing campaign because a proposal which would waive another party's statutory rights constitutes a permissive subject of bargaining. See, e.g., Reichhold Chemicals, Inc., 288 NLRB 69, 71-72 (1988), enf'd in part 906 F.2d 719 (D.C. Cir. 1990), cert. den. 498 U.S. 1053 (1991); Sheet Metal Workers Local 20 (George Koch Sons), 306 NLRB 834, 839 (1992).

We applied a somewhat different analysis to the roster and access provisions.

Under current Board law, these provisions were arguably permissive because they require waivers of the Employer's statutory rights, as noted above. Under traditional Board law, an employer has no obligation to give a union information about employees' names and addresses to facilitate union organizing. Moreover, under Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992), an employer can bar a nonemployee union organizer from access to its property absent special circumstances, not present here.

The proposals in this case could also be regarded as permissive because they related to the Union's internal interests. The Board has held that internal union matters do not encompass mandatory subjects of bargaining. See, e.g., Mid-State Ready Mix, 307 NLRB 809 (1992). In Borg-Warner, the Supreme Court held that a provision which would dictate the manner by which union members ratify collective-bargaining agreements and call strikes is a permissive subject because it "settles no term or condition of employment," but rather "deals only with the relations between the employees and their unions." Borg-Warner, 356 U.S. at 350. The roster and access clauses similarly served

the Union's institutional interests by facilitating the organization of new, unrepresented members, and, therefore, were permissive subjects.

Nonetheless, we concluded that the Region should argue that the preferred conclusion is that the roster and access proposals were mandatory because they were merely proposals for methods of implementing the Kroger clause, which is a mandatory subject. These provisions merely described the mechanisms that the Union asked the Employer to agree to as a way of implementing the Kroger clause. Thus, since the Union may lawfully insist to impasse on the Kroger clause, the Union and the Employer may bargain about, and the Union may lawfully insist to impasse on the procedure to be used -- providing names and addresses of unit employees and access to the facility where the employees are located -- to facilitate the ultimate implementation of the Kroger clause. Thus, the roster and access provisions bore the same relationship to the Kroger clause that a trustee designation proposal bore to a multiemployer benefit plan in Sheet Metal Workers International Association, 234 NLRB 1238, 1243-45 (1978), enfd. 664 F.2d 489 (5th Cir. 1981). There, after finding that the benefit plan was a mandatory subject, the Board concluded that the trustee designation proposal was similarly mandatory, and the union was privileged to bargain to impasse over the proposal, because the trustee proposal was "nothing more than the mechanism by which the composition of the board of trustees" was limited to "a reasonable number." 234 NLRB at 1244.

In response to the argument that the roster and access provisions were permissive because they were merely intended to help the Union organize the employees, we noted that the same can be said of the Kroger clause itself, since it permits the Union to tell employees, in the course of an organizing campaign, that as soon as the Union has achieved majority status, the employees will share in the already determined benefits of the existing collective-bargaining agreement and will not, unlike most employees in a newly organized facility, have to await the completion of initial contract negotiations to obtain new terms and conditions of employment. Since Kroger clauses are nonetheless deemed mandatory, the argument that the roster and access provisions were permissive because they aid union organizing must also fail.

Finally, the fact that the access proposal called for the Employer to waive its right under Lechmere to exclude nonemployee union organizers from its facility did not make the clause permissive, for the mandatory Kroger clause

likewise constituted a waiver of an employer's statutory right to demand a union victory in a Board election before recognizing and bargaining with the union.

SECONDARY BOYCOTTS

Wearing a Rat Costume as "Picketing"

In one case, we considered whether the Union violated Section 8(b)(4)(ii)(B) of the Act when, following about 5 months of area standards picketing, it stationed a person dressed as a rat in front of the main entrance of a neutral employer's building.

A company that managed a high-rise apartment building entered into an agreement with the Employer to refurbish the outside of the building. The Employer had about four to six laborers performing work on the site. Those employees were represented by and covered by a current contract with an independent labor organization.

On May 1, 1995, the Union began area standards picketing at the building directed at the Employer. The pickets were accompanied by a man wearing a rat suit. The Employer then established a reserved gate system with two gates on the sides of the building. The building was about 200' wide and in the middle front of the building, between the reserved gates, was a double set of revolving doors for the use of building employees, tenants and guests. The revolving doors therefore were about 100' from each of the reserved gates.

When the entrance for the Employer was established, the pickets moved to that entrance, but the rat continued to patrol on the sidewalk, patrolling about 50' to either side of the public entrance to the building. The rat initially either carried a picket sign or wore a picket vest, but apparently ceased wearing anything in late May 1995. During May 1995, the Union also parked a trailer in front of the building containing a large inflatable rat. The Union removed the trailer after a few weeks. While the pickets and rat initially distributed area standard handbills, there was no evidence to show that handbills had been distributed during any time relevant to the instant matter.

The evidence showed that the Employer was not paying its laborers wages and benefits equal to the area standards of the Union. However, by letter dated October 19, 1995,

the Employer informed the Union that effective October 23, 1995, all of the Employer's employees would have their wages and benefits increased to the Union's area standard. On Monday, October 23, 1995, the pickets and rat were present for only about one hour and then left. According to the Employer, the man in the rat suit stated that they were leaving because they received the letter (from the Employer). Although the pickets left, the rat returned on October 24, 1995 and remained thereafter.

The rat carried no sign and did not display any message. It was simply a man wearing a rat suit who walked back and forth in front of the public entrance between about 7:30 a.m. and 4:00 p.m. The area of patrol was about 50' on either side of the public entrance in the middle of the building, so it extended to within about 50' of each of the reserved gates.

On October 25, 1995, a subcontractor to the Employer was scheduled to begin installation of railings by two iron worker employees. When the two iron workers arrived at the site and walked towards the Employer's gate, the rat approached them. The two iron workers, employees of the subcontractor, refused to work on October 25, 1995, but worked on October 26 and 27, 1995. The Union stated that on October 25, 1995, the two iron workers approached the man in the rat suit asked if the Union was still picketing, to which the man in the rat suit responded, "No, they have the rat instead." Thereafter, the rat continued to patrol only in front of the public entrance and there was no evidence of any other effect from his presence.

Based on these facts, we concluded that the Union violated Section 8(b)(4)(ii)(B) of the Act when, following about 5 months of picketing which included a picket in a rat costume, it stationed a person dressed as a rat who patrolled in front of the main entrance of a neutral employer's building.

Section 8(b)(4)(i) and (ii)(B) makes it unlawful for a labor organization or its agents (1) to induce or encourage employees to withhold services from their employer, or (2) to threaten, coerce, or restrain any person where an object is for that person to cease doing business with another employer. This provision reflects the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressure in controversies not their own." **NLRB**

v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951).

However, Section 8(b)(4) proscribes more than just picketing. It prohibits all conduct where it was the union's intent to coerce, threaten or restrain third parties to cease doing business with the neutral employer, or to induce or encourage its employees to stop working, although this need not be the union's sole objective. Denver Bldg. & Constr. Trades Council, 341 U.S. at 688-89. See also NLRB v. Fruit and Vegetable Packers, Local 760, 377 U.S. 58, 68 (1964); Pye v. Teamsters, Local 122, 875 F. Supp. 921, 927 (D. Mass. 1995).

An unlawful intent may be inferred from the "foreseeable consequences" of the union's conduct, NLRB v. Retail Store Employees, Local 1001 v. NLRB, 447 U.S. 607, 614 n.9 (1980); UMW, District 29 (New Beckley Mining Corp.), 304 NLRB 71, 73 (1991), enf'd. 977 F.2d 1470 (D.C. Cir. 1992); the nature of the acts themselves, IBEW, Local 761 v. NLRB, 366 U.S. 667, 674 (1961) (quoting Seafarers Int'l Union v. NLRB, 265 F.2d 585, 591 (D.C. Cir. 1959)); and from the "totality of the circumstances New Beckley Mining, 304 NLRB at 73; See also Plumbers, Local 32 v. NLRB, 912 F.2d 1108, 1110 (9th Cir. 1990)." The Board has found many types of conduct to be "coercive" even though they did not involve any strike or picketing activity. See, e.g., Sheet Metal Workers, Local 80 (Limbach Co.), 305 NLRB 312, 314-15 (1991), enf'd in pertinent part, 989 F.2d 515 (D.C. Cir. 1993); United Scenic Artists, Local 829 (Theater Techniques, Inc.), 267 NLRB 858, 859 (1983), enf. denied, on other grounds, 762 F.2d 1027 (D.C. Cir. 1985); Hospital and Service Employees Union, Local 399 (Delta Airlines, Inc.), 263 NLRB 996, 999 (1982), enf. denied, 743 F.2d 1417 (9th Cir. 1984); Carpenters, Local 742 (J.L. Simmons Co.), 237 NLRB 564, 565 (1978); Ets-Hokin Corp., 154 NLRB 839, 842 (1965). See also Pye, 875 F. Supp. 921.

In DeBartolo Corp. v. Florida Building & Construction Trades Council (DeBartolo II), 485 U.S. 568, 128 LRRM 2008 (1988), the Supreme Court held that Section 8(b)(4)(ii)(B) of the Act does not proscribe peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer. The Court stated that mere persuasion of customers not to patronize neutral establishments does not thereby coerce the establishments within the meaning of Section 8(b)(4)(ii). In so doing, the Court noted that "there would be serious doubts about whether Section 8(b)(4) could constitutionally ban peaceful handbilling not involving non-speech elements, such as patrolling." 128 LRRM

at 2004. Thus, because of First Amendment considerations, the Court interpreted the phrase "threaten, coerce or restrain" with "'caution'" and "'not with a broad sweep'" to exclude non-picketing activities partaking of free speech. *Id.* at 2005-2006, quoting NLRB v. Drivers, 362 U.S. 274, 290 (1960).

In contrast to handbilling, picketing usually entails a patrolling of the facility or location involved, and is aimed at inducing those who approach the location of the demonstration to take some sympathetic action, e.g., to decide not to enter the facility involved. It is this patrolling/picketing which provokes people to respond without inquiring into the ideas being disseminated and which distinguishes picketing from handbilling and other forms of communication. See, e.g., District 1199, National Union of Hospital & Health Care Employees (South Nassau Communities Hospital), 256 NLRB 74, 75 (1981); District 1199, National Union of Hospital & Health Care Employees (United Hospitals of Newark), 232 NLRB 443, and authorities cited therein (1977), *enfd.* 84 LC para. 10826, No. 77-2474 (3d Cir. August 11, 1978).

The presence of picket signs or patrolling is not a *sine qua non* for a determination that activity should be considered tantamount to picketing. Lawrence Typographical Union No. 570 (Kansas Color Press, Inc.), 169 NLRB 279, 283 (1968), *enfd.* 402 F.2d 452 (10th Cir. 1965). Thus, confrontational conduct is also coercive under 8(b)(4). Chicago Typographical Union No. 16 (Alden Press), 151 NLRB 1666, 1669 (1965). See also Lumber & Sawmill Workers Local Union No. 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965) (discussing the meaning of "patrolling" in the context of Section 8(b)(7)(C)). In Stoltze Lumber, *supra*, for example, unlawful "picketing" was found where the union was engaged in confrontational handbilling. The decision states:

The important feature of picketing appears to be the posting by a labor organization or by strikers of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business.

Based on the above, we decided that the Union's posting of the rat who patrolled the entrance to the neutral's luxury condominium was not protected, non-picketing activity, and instead amounted to picketing. The main

entrance was used by the neutral condominium employers and tenants. Also, it appeared that the patrolling was visible to those entering the neutral gate on the east side of the building. Here, as in Stoltze Lumber, it was clear that the purpose in posting the individual dressed as a rat who patrolled in front of the building was to confront either customers or employees or prospective employees of the neutral employers (i.e., the condominium and other contractors), rather than to engage in protected Free Speech activity.

First, the rat had been present with union picketers for 5 months and initially had carried a picket sign or wore a picket vest. Thus, the rat clearly had been associated with Union picketing. Second, on October 25, two iron worker employees employed by a subcontractor of the Employer approached the premises, spoke to the rat, and immediately left, refusing to work. The Union admitted that the iron workers asked the rat if the Union was still picketing and that the individual in the rat suit replied "No, they have rat instead". Without regard to whether this statement violated Section 8(b)(4)(i)(B) in and of itself, the statement was evidence that the Union intended the rat patrol to give the impression of picketing and accomplished that objective when the iron workers refused to work. And finally, the rat was patrolling within 50 feet of each of the reserved gates which gave the appearance that the Union was still picketing the site. Indeed, as noted above, the rat, by its presence and its statements, turned away the iron workers who were scheduled to work, which delayed completion of the neutral's work.

We further decided that all of the above circumstances created the necessary confrontation which was coercive. We noted that if the Union did not intend such a result, it was obligated to clarify its objective given the fact that all the surrounding circumstances gave the clear impression that the Union was continuing to picket. Thus, there was sufficient evidence to warrant issuance of complaint alleging that the presence of the rat who continued to patrol in front of the neutral Employer's building was a continuation of the prior picketing, in violation of Section 8(b)(4)(ii)(B). However, the wearing of the rat suit in and of itself, i.e., in the absence of patrolling, was not a violation of the Act. Therefore, once the Union dissociated the rat's activity from picketing, the Union could have stationed a person dressed as a rat to stand in front of the Employer's building, as long as the rat did not patrol or otherwise engaged in picketing activity.

Demonstrations As Protected Picketing
Under the Section 8(b)(7)(C) Proviso

One case raised issues whether Union demonstrations in the lobby of an Employer's office building constituted "picketing" and, if so, whether the picketing was protected by the second proviso to Section 8(b)(7)(C).

The Employer had a contract to provide parking services at an airport. The Union had unsuccessfully attempted to obtain from the Employer voluntary recognition as the representative of its employees since May 1995.

The Union picketed the Employer for recognition on three occasions during a 36-day period, resulting in the Employer's filing a Section 8(b)(7)(C) charge in this case. The Union gave certain assurances regarding this conduct and future picketing and, on November 2, entered into a proposed Settlement Agreement. The Employer would not agree to his settlement agreement, maintaining that the allegedly unlawful picketing continued.

On November 11, approximately 25-30 people entered the lobby of the Employer's offices located in a building on the grounds of the airport. When the Employer's general manager arrived, he refused the crowd's demand that the Employer sign a contract with the Union. The crowd remained and chanted for the manager until the crowd finally was asked to leave by security police. No one carried placards or picket signs. However, individuals in the crowd distributed leaflets to anyone entering the lobby. The leaflets essentially stated that the Employer was non-union, did not have a contract with the Union, and did not pay union wages, benefits or conditions. There was no evidence that the demonstrators obstructed the entrances to the building.

On November 22, approximately 20-25 demonstrators again entered the Employer's lobby. For approximately 10 minutes, the group shook cans filled with rocks and chanted for the general manager, that they wanted a "union now," and phrases like, "Unionbusters got to go!" and "No justice, no peace!" Demonstrators also distributed leaflets which referred to alleged Employer unfair labor practices. The leaflet further charged that the Employer was "continuing to operate non-union without a contract with" the Union. The Employer's general manager called the police, who dispersed the crowd and arrested two individuals. As on November 11, demonstrators did not block the doors to the lobby or carry placards. However, someone in the group hung a rubber

chicken at a window facing a public parking lot with a sign around its neck listing names of three Employer officials.

We decided that although the November demonstrations arguably constituted picketing within the meaning of Section 8(b)(7)(C), the conduct was protected by the second, publicity proviso.

A necessary element of a Section 8(b)(7)(C) violation is that a union picket, as opposed to using other protected means of advertising a labor dispute with, an employer. See Hotel & Restaurant Employees Local 274 (Warwick Caterers), 269 NLRB 482 (1984). Thus, in distinguishing between handbilling and picketing in a Section 8(b)(4) case; the Supreme Court noted that picketing involved "a mixture of conduct and communication," and the conduct element "often provides the most persuasive deterrent to third persons about to enter a business establishment." DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 580 (1988), quoting NLRB v. Retail Store Employees, 447 U.S. 607, 619 (1980).

Patrolling and the carrying of placards may evidence, but are not per se elements of, picketing. See, e.g., Teamsters Local 282 (General Contractor's Association of New York), 262 NLRB 528 (1982) and cases cited therein. "One of the necessary conditions of picketing is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises." Chicago Typographical Union No. 16 (Alden Press), 151 NLRB 1666, 1669 (1965). The Board has further noted that,

[t]he important feature of picketing appears to be the posting by a labor organization or by strikers of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business.

Lumber & Sawmill Workers Local 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965). Accord: Service Employees Local 87 (Trinity Maintenance), 312 NLRB 715, 743 (1993); Laborers Local 389 (Calcon Construction), 287 NLRB 570, 573 (1987). The effect of this confrontation, "which may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated," distinguishes picketing from the advertisement of a dispute through peaceful handbilling. Bakery & Pastry Drivers &

Helpers, Local 802, IBT v. Wohl, 315 U.S. 769, 776 (1942) (Douglas, J., concurring).

Thus, a union which chooses not to advertise its dispute by carrying placards may nevertheless picket an employer by engaging in other activities to confront the public with its demands. In Service Employees Local 87 (Trinity Maintenance), approximately 30 union demonstrators marched in front of the entrance to an office building waving small red pennants carrying the message "Justice for Janitors," while others attempted to affix a large white banner bearing the same legend onto the side of the building. The demonstrators loudly chanted (some with bullhorns), sang and blew whistles while marching. About 12-15 individuals entered the lobby, continued the demonstration, and surrounded an employer representative while chanting before the police removed them from the lobby. Around four months later, another group of approximately 40 union demonstrators marched a few feet in front of the main entrance to the employer's building for two hours, waving pennants and chanting union slogans. Demonstrators also handbilled members of the public, some of whom were forced to squeeze past the demonstration on their way in and out of the building. The Board agreed with the ALJ that the union's conduct on both occasions constituted "confrontational conduct" which rose to the level of picketing. 312 NLRB at 724, 728-29, 746, 748. As to the earlier incident, the ALJ noted the union's desire to disseminate information to the public concerning its labor dispute did not require the tactics it chose to utilize, specifically, the "excessive" noise, harassment of the employer representative and the attempt to enter the building. Id. at 746.

We decided that the Union's November demonstrations arguably rose to the level of picketing. During the demonstrations, the Union filled the lobby of the Employer's office building with bodies as well as noise. Significantly, the Union stationed individuals in the lobby in order to leaflet anyone entering or exiting the building. As noted in the cases cited above, the Board often considers this "posting" of union agents at entrances to a facility - effectively creating a line between demonstrators and the public - to be an "important" element in picketing. Moreover, the chanting, demands to speak with the Employer's manager, speeches, milling about, and, on November 22, shaking of noisemakers arguably constituted "confrontational conduct" along the lines established in Trinity Maintenance.

It was also clear that the picketing had a recognitional object. On November 11, demonstrators specifically asked if the Employer would recognize the Union. On November 22, they similarly chanted slogans demanding that the Employer accept the Union as the employees' representative. Union leaflets, stating that the Employer was non-union, further established a recognitional objective. Therefore, since the Union's pre-settlement recognitional picketing continued for more than 30 days without an election petition being filed, the Union violated Section 8(b)(7)(C) unless the picketing was protected by the publicity proviso.

The second proviso exempts from the proscription of Section 8(b)(7)(C) "any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization...." In Crown Cafeteria II, the Board reversed an earlier decision (130 NLRB 570 (1961)) and concluded that the publicity proviso protects informational picketing which also has an organizational or recognitional objective. See Hotel & Restaurant Employees Local 681 (Crown Cafeteria II), 135 NLRB 1183, 1185 (1962), *aff'd sub nom. Crown Cafeteria v. NLRB*, 327 F.2d 351 (9th Cir. 1964), where the Board noted that the statutorily-protected phrases,

"does not employ members of" clearly imports a present object of organization, and "[does not] have a contract with" just as clearly implies a recognitional and bargaining object.

The Board has consistently adhered to this holding. In Plumbers Local 32 (Robert E. Bayley Construction), 315 NLRB 786, 790 (1994), the Board held that picketing was within the scope of the publicity proviso where the union truthfully apprised the public that the employer did not employ its members, despite the union's evident recognitional object. Although the Board still found a violation because the picketing had the statutorily impermissible effect of interfering with deliveries, there was no evidence of a similar effect here. In Smitty's Supermarkets, 310 NLRB 1377, 1378 (1993), the Board quashed a subpoena seeking evidence, in the context of the publicity proviso, that the union picketed the employer with a recognitional object because, under Crown Cafeteria II, a recognitional object was "implicit in the nature of the messages that may be conveyed to the public under the language of the proviso," and therefore inquiries about a recognitional object were irrelevant. See also Carpenters

Local 2361 (Adams Insulation), 248 NLRB 313, 314 n.4 (1980), aff'd 651 F.2d 61 (9th Cir. 1981):

Here, the Union's message clearly was protected by the publicity proviso. The November 11 handbill stated that the Employer "does not have a contract" with the Union, "does not pay Union wages," and was "non-union." The November 22 leaflets provided that the Employer was "continuing to operate non-union without a contract with" the Union. Similar language has long been held to fall within the ambit of the proviso. See, e.g., Construction Laborers Local 1140 (Lanco Corp.), 227 NLRB 1247, 1248 (1977) ("Does not pay union wages"); Grain Millers Local 16 (Bartlett & Co. Grain), 141 NLRB 974, 977, 980 (1963) ("Unfair. Non-union. Refuses to employ grain millers."). And, as established in the line of cases extending from Crown Cafeteria II through Bayley Construction, the Union's recognitional object did not serve to deprive it of its statutory right to picket with a protected, informational purpose.

We further decided that the Board's decision in Newspaper & Mail Deliverers (Macromedia Publishing), 289 NLRB 537 (1988), did not require a different conclusion. There, the union engaged in recognitional picketing in order to inform the public that the employer "does not employ members" of the union. The Board held that the picketing was outside the protection of the publicity proviso, and thus violative of Section 8(b)(7)(C), because it had the impermissible effect of inducing individuals not to perform services for the employer. *Id.* at 540. However, the Board first noted that despite the proviso-protected language of the picket signs, an apparently additional element of the violation was the union's object of picketing the employer for immediate recognition.

We decided that the Board did not thereby intend to silently overturn more than thirty years of settled law protecting informational picketing even though it necessarily incorporates a recognitional object. The Board did not specifically rely on any case authority for this novel interpretation of Section 8(b)(7)(C) and has never cited Macromedia for this proposition. Rather, the Board has continued to apply the Crown Cafeteria II holding in a subsequent series of cases, including Bayley Construction and Smitty's Supermarket. Moreover, as set forth above, the Board in Macromedia did not even need to reach this conclusion in light of its finding that the picketing had an impermissible effect on the employer.

Therefore, although we decided that the November demonstrations constituted picketing, it was nevertheless protected by the publicity proviso to Section 8(b)(7)(C).

PROCEDURE

Deferral to Grievance Procedure Where Violations Undermined Grievance

In another case, we considered whether deferral to the parties' grievance procedure under Collyer Insulated Wire, 192 NLRB 837 (1971) was appropriate where the violations arose during the grievance procedure and involved the entire bargaining unit.

The Union learned that the Employer had hired nonunion workers for a job covered by the parties' bargaining agreement. The Union called the Employer to protest and also warn that the Union might file a Board charge. The Employer's manager demanded to know which employee had told the Union about the job stating "I'll fire the ****!"

A few minutes after this conversation, the manager accused one of the five unit employees of going to the Union and also threatened to fire him, make his life miserable and make sure he never worked in the area again. The manager approached that employee several more times later that day, repeating that that he would be fired. The manager also asked another employee if he knew who had called the Union. Shortly thereafter, the manager held an employee meeting and asked all five unit employees whether they had called the Union and also threatened loss of jobs. Later that evening, the Union spoke to a supervisor who stated that the manager had sent him to question employees about who had called the Union. The supervisor stated that he therefore had questioned four unit employees.

We decided not to defer these unlawful interrogations and threats to the parties' grievance-arbitration procedure.

In Joseph T. Ryerson & Sons, Inc., 199 NLRB 461, 462 (1972), the Board refused to defer a charge alleging that the employer threatened a union officer during grievance processing if he pursued the grievance. The Board reasoned that

the violation with which this Respondent is charged, if committed, strikes at the foundation

of that grievance and arbitration mechanism upon which we have relied in the formulation of our Collyer doctrine...we must assure ourselves that those alternative procedures are not only "fair and regular," but that they are or were open, in fact, for use by the disputants. These considerations caution against our abstention on a claim that a respondent has sought, by prohibited means, to inhibit or preclude access to the grievance procedures.
199 NLRB at 462.

However, in United Aircraft Corp., 204 NLRB 879 (1972), a Board majority deferred charges that the employer harassed employees acting as stewards because of their union activities. The Board reasoned that the alleged acts of harassment and coercion had occurred at only three of the employer's nine facilities, where over 40,000 individuals were employed, and involved only 13 out of 1,645 first-level supervisors and several plant security employees. The Board noted, however, that it would not have deferred had the employer engaged in serious past unlawful conduct, or if the "evidence also should indicate that the parties' own machinery is either untested or not functioning fairly or smoothly." 204 NLRB at 879.

Thereafter, in United Technologies Corp., 268 NLRB 557 (1984) the Board overruled past precedent and expanded its deferral policy to include arguably meritorious Section 8(a)(1) charges, in circumstances where the dispute is cognizable under the parties' grievance and arbitration procedure; there is no conduct alleged that would constitute a rejection of the principles of collective bargaining; and the charged party is willing to arbitrate. Applying these principles, the Board distinguished Ryerson and deferred a threat of alleged retaliation against an employee if she chose to pursue a grievance. The Board relied on United Aircraft Corp., *supra*, for the proposition that the alleged misconduct "does not appear to be of such character as to render the use of that machinery unpromising or futile." 268 NLRB at 560, n.21. The Board noted that the alleged threat was made by a single foreman to a single employee and a shop steward during the course of a routine first-step grievance meeting.

Subsequent to United Technologies, the Board in United States Postal Service, 290 NLRB 120 (1988) held that deferral was inappropriate where the Postmaster refused to reassign and promote an employee and threatened to harass, retaliate against, and prevent the employee's advancement

because he had filed grievances and EEO complaints. The Board noted that the grievances and EEO complaints consistently were resolved in the employee's favor; the grievance-arbitration procedure had been totally ineffective in curbing the employer's proclivity to retaliate against the employee for filing grievances; and that this pattern of hostile conduct was fundamentally at odds with the Act and the policy behind deferral.

Based on the above, the Board has limited the application of Ryerson to those situations where it can be shown that the Employer has interfered with the grievance-arbitration provisions of the contract in a way that has rendered access to it futile or unpromising. It must be demonstrated that the Employer's actions are a genuine obstacle to utilization of the grievance-arbitration procedure. See, e.g., North Shore Publishing Co., 206 NLRB 42 (1973) (no deferral where employee was discharged for invoking grievance procedure after being threatened by foreman that reprisals would ensue if grievance were not withdrawn); Dallas & Mavis Forwarding Co., 291 NLRB 980 (1988) (no deferral, in part, where employer arguably retaliated against employees because they sought their union's assistance in obtaining information regarding the enforcement of contract rates).

In our case, the Employer's general manager threatened the entire employee unit with devastating retaliation if they did not reveal who had provided the Union with information necessary for the enforcement of the collective-bargaining agreement. We recognized that, under the rationale of Ryerson, the Board has not deferred only where unlawful activity has been leveled directly at the use of the grievance procedure itself. We nevertheless decided to apply Ryerson here because the Employer's unlawful conduct arose during the first step of the grievance procedure, and became a genuine obstacle to that procedure rendering access to it futile or unpromising.

The parties' grievance procedure contained several "steps" beginning with a first oral step. Thus, when the Union called the Employer's manager to protest the painting work, the Union in effect was invoking the first oral step of the grievance procedure. That invocation was met with unlawful threats as the beginning of the torrent of flagrant unlawful activity. The result was no further activity under the parties' grievance procedure and instead the filing of the instant charge.

It seemed clear that the Employer's violations, although not directed specifically at the grievance procedure, nevertheless arose during and were immediately caused by that procedure. We decided, therefore, that these numerous violations had become a genuine obstacle to the utilization of the parties' grievance-arbitration procedure and had rendered access to that process futile or unpromising. The flagrant unfair labor practices in this case were no less effective in undermining the grievance procedure as would have been a direct attack upon either an employee grievant or the grievance procedure itself. Accordingly, we decided that further proceedings were warranted and the Region should not invoke Collyer deferral.

Equitable Tolling of the Section 10(b)
Statute of Limitations Period

In a rather unusual case, we concluded that under principles of equitable tolling, Section 10(b) of the Act did not preclude the timely filing of unfair labor practice charges based on events occurring more than four years prior to the filing of the charges.

In 1976, the Union was certified by the state labor board as representative of a unit of employees determined by the state board to be agricultural employees. The parties thereafter negotiated a series of collective bargaining agreements, the latest of which expired in March 1989. In August 1989 contract negotiations broke down and a strike began. After a few months the Union offered an unconditional return to work but the Employer refused and locked out the workers.

The Union and the Employer thereafter filed unfair labor practice charges against each other with the state labor board and in early 1990 the state board issued complaint against the Employer. The Employer challenged the state board's jurisdiction and filed unfair labor practice charges with the NLRB as well as a unit clarification petition, maintaining that its employees were non-agricultural. In May 1991 the NLRB Regional Director issued a decision finding that the Employer was non-agricultural at the time the petition was filed, but expressly declined to decide whether the Employer was non-agricultural in 1989, noting that that issue was pending before the state board.

In September 1991 the Union filed charges with the NLRB which were identical to those being litigated before the state board. The Regional Director dismissed these charges

on Section 10(b) grounds and the Union's appeal of that dismissal was denied.

Meanwhile, the state board confirmed its jurisdiction over the Employer and a state administrative law judge thereafter issued a decision recommending the finding of unfair labor practices against the Employer.

In 1991 the Employer filed suit in federal district court seeking to enjoin the state board proceedings. The Court denied the request. The Employer then filed a petition in federal district court alleging that the state board proceedings were preempted by NLRB jurisdiction. The district court denied the petition but was reversed by the Circuit Court of Appeals, which concluded in September 1994 that the NLRB proceedings were preempted because it was arguable that the Employer and its employees were non-agricultural in 1989.

The union filed the instant charges in December 1994. The charges were identical to the ones processed by the state board as well as those previously filed with and dismissed by the NLRB in 1991. The Regional Director again dismissed on Section 10(b) grounds and the Union filed the subject appeal.

Applying principles of equitable tolling, we concluded that the six-month limitations proviso to Section 10(b) of the Act did not prohibit processing of the charges.

Although there is no Board law dealing directly with the doctrine of equitable tolling in circumstances like those presented here, it is well recognized that Section 10(b) is a statute of limitations to which such equitable doctrines are applicable. Zipes v. Trans-World Airlines, Inc., 455 U.S. 385, 385 fn. 11 (1982). See also, NLRB v. Laborers Int'l Union, 529 F. 2d 778, 781-785 (8th Cir. 1976); Shumate v. NLRB, 452 F. 2d 717, 720 (4th Cir. 1971); NLRB v. A.E. Nettleton Co., 179 F. 2d 504, 506-507 (5th Cir. 1950). The Board has applied equitable tolling in cases of fraudulent concealment. See e.g., Kanakis Co., 293 NLRB 435 (1989). (See also, Hydro Logistics, Inc., 287 NLRB 602, 603-604 (1987), wherein then Board Chairman Dotson, in his dissent, made a strong equitable argument in favor of waiving the 10(b) period even though the Employer had failed to timely raise its 10(b) defense before the administrative law judge, prior to its filing of exceptions with the Board.)

While it is recognized that equitable tolling is not routinely applied (Irwin v. Department of Veteran Affairs, 498 U.S. 89, 96 (1990)), it was noted that the doctrine has been applied in circumstances not unlike those presented here. Thus, in Fox v. Eaton Corporation, 615 F.2d 716 (6th Cir. 1980), the plaintiff wrongly filed a Title VII action in state court. After being notified that the state court was without jurisdiction, the plaintiff refiled in the correct federal court, but was untimely. The court of appeals concluded, "...such tolling is appropriate, even in the absence of misleading conduct by the employer, when the employee filed a timely Title VII action in a court and there exists a reasonable legal theory for invoking the jurisdiction of that court." Supra at 716. The court noted that although the action was filed in the wrong court, the purpose of the limitations period was served by the filing of that action, in that "the defendant received timely notice of the statutory claim and the plaintiff displayed due diligence in asserting his/her rights." Supra at 719.

Further, in Hill v. Georgia Power Company, 786 F.2d 1071 (11th Cir. 1986), (where plaintiffs, who had been discharged, brought "hybrid suits" under Section 301 of the Labor Management Relations Act against the employer and the union), the court of appeals, after holding that the six month limitations period of Section 10(b) was applicable to such hybrid claims, went on to apply the principles of equitable tolling to the plaintiff's untimely filing in federal court after the timely filing in state court.

The rationale and purpose behind Section 10(b), like other statutes of limitations, are to provide notice to the defendant, prevent stale claims and encourage prompt resolution of disputes. In Hill and Fox, supra, these goals were achieved. In each case, the plaintiff justifiably believed that he/she was properly and diligently pursuing his/her claims and the defendant had prompt notice of such claims. Similarly, in the instant case, the Employer has at all times had notice of the Union's unfair labor practice allegations. The Employer was put on notice that a charge had been filed back in 1989, and because of this notice and the fact that the state board continued to assert jurisdiction over the matter until the court of appeals determined in 1994 that the state board was without jurisdiction, the action had not become stale. Thus, the purposes of Section 10(b) have been served although the Union's filing was procedurally defective.

The fact that the appeal of the charge previously filed in 1991 was denied on 10(b) grounds was not deemed to preclude the application of the equitable principles presented here. The dismissal of a charge, even if upheld on appeal, does not preclude issuance of complaint on the same allegations if the new charge is not otherwise time-barred. See International Union of Operating Engineers Local 406, AFL-CIO v. NLRB, 701 F.2d 504, 511 and cases cited. See also, Staff Officers Association of America (Delta Steamship Lines), 277 NLRB 1137, 1149 (1985). This is particularly applicable herein since the underlying dispute was still alive, the state board had continually asserted jurisdiction over the dispute, the jurisdictional issue was not finally resolved until the court of appeals decision in 1994, and the impact of the state board's continued insistence that it had jurisdiction was not considered at the time of the earlier dismissal.

We therefore concluded that equitable tolling was applicable here to excuse the Union's untimely filing.

Amending A Board Charge Then Pending Appeal

In one case we considered whether the Union could amend a charge to add new allegations after the charge had been dismissed by the Regional Director, but while an appeal from the Regional Director's decision was pending.

The Employer and the Union were parties to a collective bargaining agreement which expired by its terms in 1994. After forty-six bargaining sessions over a three-and-one-half month period, the Union rejected the Employer's "last best and final offer" for a successor contract and initiated a nationwide strike. A few weeks later the Employer announced the implementation of certain provisions of its final offer. The Employer's final offer included a "wage application" provision which, according to the Union, allowed the Employer to unilaterally change wage rates through a time study conducted by the Employer's time study engineer. The final offer also included an "hours and overtime" provision which stated that the Employer could from time to time choose from certain standard work day/work week options.

The Union filed a timely unfair labor practice charge which alleged, inter alia, that the Employer had refused to bargain in good faith in violation of Section 8(a)(5) of the Act by refusing to respond to Union proposals, engaging in

surface bargaining, and implementing changes in terms and conditions of employment prior to reaching impasse. The Regional Director dismissed the charge, and the Union filed a timely appeal.

Meanwhile, subsequent to the Regional Director's dismissal of the charge, the Union sought to amend the charge to allege, in pertinent part, that the Employer had violated Section 8(a)(5) by insisting to impasse on, and implementing, "wage application" and "hours and overtime" proposals which waived the Union's statutory rights and involved permissive subjects of bargaining. Although these allegations were also set forth in a new charge, that charge was untimely under the six-month limitations proviso set forth in Section 10(b) of the Act.

While we concurred with the Regional Director's determination that the parties had bargained to impasse and that the Employer had not engaged in surface bargaining, we determined that the Union should be permitted to amend the original, timely-filed charge to include allegations concerning the Employer's implementation of the "wage application" and "hours and overtime" proposals. We further determined that the case should be remanded to the Region for a full investigation of those allegations and a determination on their merits.

Section 10064.4 of the NLRB Casehandling Manual, Unfair Labor Practice Proceedings, Part One, states that "(a)n amendment filed after dismissal of a charge should be docketed as a new charge, no matter how titled, and assigned a new number." However, since the original charge was still pending on appeal, the case was not closed and the charge could be amended to include the new allegations, provided they were closely related to the allegations in the charge. See, e.g. NLRB v. Fant Milling Co., 360 U.S. 301 (1959).

In applying the closely-related test in Redd-I Inc., 290 NLRB 1115, 1118 (1988), the Board stated that it would look at three factors: 1) whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge, i.e., whether the allegations all involve the same legal theory and usually the same section of the Act; 2) whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge; and 3) whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the

otherwise untimely allegations as it would in defending against the allegations in the pending timely charge.

The new allegations need not be exactly similar to the original allegations in their factual and legal foundations to meet the closely-related test. Thus, in NLRB v. Fant Milling, supra, the Supreme Court held that a charge alleging a general refusal to bargain, which had been dismissed and was pending on appeal, could properly be found to encompass a later unilateral wage increase. Similarly, in Roslyn Gardens Tenants Corp., 294 NLRB 506, 507 (1989), the Board held that a charge alleging that the employer had failed to bargain in good-faith by refusing to execute an agreed-upon contract was properly amended to include an allegation concerning a unilateral change in terms of employment.

In the case which was before us, both the new allegations and the allegations in the timely-filed charge involved alleged violations of Section 8(a)(5). The timely-filed charge specifically alleged, in relevant part, that the Employer had failed to bargain in good faith in violation of Section 8(a)(5) "by refusing to respond to Union proposals and insisting on the acceptance of all their proposals as a package, on a take-it-or-leave-it basis" and "by implementing changes in the terms and conditions of employment before impasse had been reached." The new allegations alleged that the Employer insisted to impasse on, and subsequently implemented, proposals which required the Union to waive its statutory rights in violation of Section 8(a)(5). These new allegations concerned conduct which occurred during the negotiations that were the subject of the original charge. While the legal theories underlying the two sets of allegations might be somewhat different, the Employer's defense in many ways would be similar since it would turn on the Employer's bargaining positions during the negotiations and would require similar evidence concerning the course of bargaining. Thus, it was concluded that the allegations concerning the "wage application" and "hours and overtime" provisions were closely related to the allegations in the timely-filed charge so as to permit amendment of that charge.

Accordingly, we remanded the case to the Region for further investigation and a decision on the merits concerning the allegations that the Employer had unlawfully insisted to impasse on, and implemented, the "wage application" and "hours and overtime" provisions of its final offer.

Effect of Settlement Agreement On
Reinstatement of Decertification Petition

In one case we considered Union objections that a settlement agreement with a non-admissions clause would leave a decertification petition subject to possible reinstatement after the Employer had complied with the provisions of the settlement.

A bargaining unit employee had filed a timely decertification petition signed by more than 200 of the approximately 437 employees in the unit. The Union in turn filed unfair labor practice charges alleging, inter alia, Employer involvement in the solicitation of signatures on the petition.

The Regional Director issued complaint alleging, in pertinent part, that the Employer had violated Section 8(a)(1) of the Act while the petition was being circulated by removing union leaflets from non-work areas, soliciting two employees to sign the decertification petition, interrogating the same two employees about their union activities, and discriminatorily prohibiting discussion of union-related matters and distribution of union literature during non-work time. The Regional Director dismissed the decertification petition on grounds that there was sufficient evidence of management and supervisory involvement in the petition to taint the showing of interest. The Board affirmed the Regional Director's decision to dismiss the petition, but did not decide the issue of taint. Rather, the Board dismissed the petition on grounds that a question concerning representation could not be raised during the pendency of related unfair labor practice proceedings. The Board noted that the petition was subject to reinstatement, if appropriate, upon disposition of the pending unfair labor practice charges.

The Employer subsequently agreed to settle the unfair labor practice charges and executed a settlement agreement with a non-admissions clause. The Union objected to the settlement agreement because, absent an agreement by the petitioner to withdraw the decertification petition or an admission of unlawful conduct by the Employer, the petition might be subject to reinstatement upon the request of the petitioner after the Employer complied with the provisions of the settlement.

We determined that the settlement agreement substantially remedied the alleged violations and was

appropriate. We noted that the Board has a long-standing policy of encouraging the settlement of unfair labor practice charges. Moreover, the Board has indicated its approval of unilateral settlement agreements with non-admissions clauses in cases where decertification petitions were pending. See, e.g., Nu-Aimco, 306 NLRB 978, 980 (1992); Canter's Fairfax Restaurant, 309 NLRB 883, 884 (1992). While those cases did not involve timely allegations of direct supervisory involvement in the petitions, we noted that there was nothing in the settlement agreement to preclude the Regional Director from dismissing the petition again if he determines that the showing of interest was in fact tainted by the Employer's direct involvement in the decertification effort. Canter's Fairfax Restaurant, 309 NLRB at 884.

NOTE: Following our decision in the above case, the Board issued a decision in Douglas-Randall, 320 NLRB No. 14 (December 22, 1995), overruling Passavant Health Center, 278 NLRB 483 (1986), and its progeny. In Douglas-Randall, an RD case, the Board held that an employer's agreement to settle outstanding Section 8(a)(5) charges by recognizing and bargaining with a union will require final dismissal, without provision for reinstatement, of a decertification petition filed subsequent to the onset of the alleged unlawful conduct. The Board also held that a collective-bargaining agreement reached during bargaining pursuant to the settlement agreement will serve as a further bar to the petition under the Board's normal contract bar rules. Douglas-Randall, unlike the above case, involved an alleged refusal to recognize and bargain with the union therein. It did not involve allegations of supervisory involvement in a decertification petition which, depending on the circumstances, might or might not be sufficient to taint the petition. The Board did note, however, that "regardless of the nature of a settlement, direct involvement by the employer in a decertification effort may still result in dismissal of a petition on traditional tainted showing of interest," citing Canter's Fairfax Restaurant, supra. Douglas-Randall, 320 NLRB No.14, slip op. at p.4, n.10. Thus, Douglas-Randall would not change either the analysis or the outcome in the above case and, in fact, supports our conclusion that the issue of supervisory taint can be addressed during the R-case proceeding.

REMEDIES

Extraordinary Remedies for
"Hallmark" Violations

We recently questioned the remedial adequacy of employers merely posting notices and furnishing updated Excelsior lists, or rather whether the extraordinary remedies of notice reading, notice mailing, notice publication and union access should be ordered, in all organizing cases involving "hallmark" Section 8(a)(1) violations where more than a de minimis portion of the bargaining unit is exposed to the coercive conduct.

A preliminary investigation in one case indicated that during an organizational campaign, the Employer committed a large number of "hallmark" Section 8(a)(1) violations, i.e. threats of plant closure, discharge and loss of benefits, as well as many less serious violations. There was insufficient evidence of threatened plant closure and job loss by high-level officials to large groups of employees. Moreover, even assuming that all 51 other alleged threats of plant closure, discharge and/or loss of benefits (about 35 by upper or mid-level supervisors) were unlawful, and were heard by the maximum number of employees (142) indicated by the evidence, only a relatively small part of the 1,841-employee bargaining unit directly would have heard the hallmark 8(a)(1) threats. Nevertheless, this figure represents a not insubstantial number of unit employees. Finally, it appeared that almost the entire unit is Hispanic, and there has been approximately a 30-40 percent turnover in the unit since the commission of the unfair labor practices.

We decided that the extraordinary remedies of notice reading and mailing should be ordered in these and all union organizing cases which involve "hallmark" Section 8(a)(1) violations where a small, but not insignificant, portion of the bargaining unit is exposed to the coercive conduct.

Hallmark violations "threaten the very livelihood of employees, [and] are likely to have a lasting impact which is not easily erased by the mere passage of time or the Board's usual remedies..." O-1 Motor Express, 308 NLRB 1267, 1268 (1992). Such violations committed on a widespread and flagrant basis during organizing campaigns command special remedial attention from the Board, even where they are not widespread or severe enough to warrant a Gissel bargaining order. See Fieldcrest Cannon, 318 NLRB No. 54 (1995); Three Sisters Sportswear Co., 312 NLRB 853

(1993); Texas Super Foods, 303 NLRB 209 (1991); Monfort of Colorado, 298 NLRB 73 (1990), enfd. 965 F.2d 1538 (10th Cir. 1992); S.E. Nichols, 284 NLRB 556 (1987), enfd. in rel. part 862 F.2d 952 (2d Cir. 1988); Sambo's Restaurant, 247 NLRB 777 (1980); Haddon House Food Products, 242 NLRB 1057 (1979), enfd. in rel. part 640 F.2d 392 (D.C. Cir. 1981). Thus, in non-Gissel cases where a large portion of the bargaining unit is exposed to the hallmark conduct, the Board typically orders a "package" of extraordinary remedies: notice reading, notice mailing, notice publication and union access. See Fieldcrest Cannon, 318 NLRB No. 54, slip op. at 4-5; Three Sisters Sportswear Co., 312 NLRB at 854-56, 881-82. However, the remedies ordered in cases involving less widespread hallmark discharge violations (notice posting, along with reinstatement and backpay) often are no different from those ordered by the Board where non-hallmark violations of the Act have been found. See S.E. Nichols-Dover, 159 NLRB 1071 (1966), enfd. 374 F.2d 115 (3d Cir. 1967); S.E. Nichols of Ohio, 195 NLRB 939 (1972), enfd. 472 F.2d 1228 (6th Cir. 1972); S.E. Nichols Marcy, 229 NLRB 75 (1977), enfd. by consent judgment No. 77-4154 (2d Cir. 1977). Thus, no Board case has ordered extraordinary remedies where a relatively small, although not insignificant, percentage of the employee complement was exposed to Section 8(a)(1) hallmark violations.

We decided that the Board should be given the opportunity to decide whether mere notice posting is inadequate to remedy "hallmark" violations of the Act. Under Section 10(c), NLRB remedies must effectuate the policies of the Act, and Congress intended that the Act accomplish three basic objectives: free and unimpaired collective bargaining, free choice in the selection of a bargaining representative, and freedom to engage in, or refrain from, concerted activity for mutual aid and protection. NLRB v. Pa. Greyhound Lines, 303 U.S. 261, 265-66 (1938). However, we noted two polls of employees recently cited by the Dunlop Commission indicating unawareness of or fear in exercising their Section 7 rights. See Fact Finding Report: Commission On The Future Of Worker Management Relations, 74-75 (1994), reporting that in a 1988 Gallup Poll, 69 percent of employees stated that "corporations sometimes harass and fire employees who support unions." In a 1991 Fingerhut-Powers poll, 59 percent said it was likely they would lose favor with their employer if they supported an organizing drive, 79 percent agreed that it was either "very" or "somewhat" likely "that nonunion workers will get fired if they try to organize a union," and 41 percent of responding nonunion employees believed that "it is likely that I will lose my job if I

tried to form a union." Legal commentators similarly have stated that the Board's current remedial scheme, primarily based on notice posting, does not reassure employees that their Section 7 rights will be respected by their employer and protected by the Board. See Charles J. Morris, A Blueprint For Reform Of The National Labor Relations Act, 8 Admin. L.J. Am.U. 517, 528 (1994); Paul Weiler, Promises To Keep: Securing Worker's Rights To Self Organization Under The NLRA, 96 Harv.L.Rev. 1769, 1770, 1788-89 (1983); John W. Teeter, Jr., Fair Notice: Assuring Victims Of Unfair Labor Practices That Their Rights Will Be Respected, 63 UMKC L.Rev. 1, 16 (1994).

Increased use of remedial notice reading is desirable given that illiteracy is a major problem in the American workplace. Moreover, "[l]iteracy deficiencies are not confined to the unskilled. Many skilled, clerical, and technical employees also suffer from deficiencies in language..." Teeter at 5 (citing Claire J. Anderson & Betty R. Ricks, Illiteracy-the Neglected Enemy in Public Service, 22 Pub. Personnel Mgmt. 137, 142 (1993)). However, even assuming 100 percent literacy in the bargaining unit, notice posting suffers from additional logistical problems. Literate employees may not observe the printed notice at the workplace: "[s]tudies of American workplaces have demonstrated that not all employees consult company bulletin boards where such notices are typically placed...some employees may never read notices attached to bulletin boards because they do not frequent those areas of the plant or are too busy to read such notices." Teeter at 5 n.54 (citing Helen Baker, Transmitting Information Through Management And Union Channels, 41-43 (1949)). Courts have also recognized that "[a]n employee who must scan the Board's notice hurriedly while at work, under the scrutiny of others, will not be as able to absorb its meaning and hence to understand his legal rights...." Teamsters Local 115 v. NLRB, 640 F.2d 392, 400 (D.C. Cir. 1981) (quoting J.P. Stevens & Co. v. NLRB, 380 F.2d 292, 304 (2d Cir. 1967)).

Moreover, in approving a notice reading requirement, the D.C. Circuit Court of Appeals observed that notice remedies are intended to inform employees of their statutory rights and the legal limits on the employer's conduct, and to reassure them that further violations of the NLRA will not occur. 640 F.2d at 399-400. The D.C. Circuit further noted "[e]ven more demanding than the needs of current employees are the needs of the former employees who were the direct victims of the Employer's violations; posting the notice at the plant hardly serves to communicate its contents to them." 640 F.2d at 401. According to another

court, "the reading requirement is an effective but moderate way to let in a warming wind of information and, more important, reassurance." J.P. Stevens & Co. v. NLRB, 417 F.2d 533, 540 (5th Cir. 1969).

In the instant case, the bargaining unit experienced a turnover rate between 30 percent and 40 percent since the time the "hallmark" unfair labor were committed. Since the goal of NLRB notices should be adequate communication of the Respondent's intention not to engage in certain unfair labor practices in the future, both to adversely affected employees who are currently working for Respondent and to those whose employment relationship with Respondent has ceased, mailing of notices is a relatively non-burdensome means of achieving that end.

However, we decided specifically to not seek the additional remedies of notice publication and union access. Thus, notices must be reprinted in appropriate company publications where the Board "deems it necessary to convince the employees that the Employer has adopted an official policy of complying with its legal obligations." 640 F.2d at 401. The Board can also order the notice to be reprinted in newspapers of general circulation in the vicinity. Ibid. This order "helps insure that all interested persons will receive notice" and, "where the violations are flagrant and repeated, the publication order has the salutary effect of neutralizing the frustrating effects of persistent illegal activity by letting in 'a warming wind of information and, more important, reassurance.'" 640 F.2d at 401 (quoting NLRB v. Union Nacional de Trabajadores, 540 F.2d 1, 12 (1st Cir. 1976)). Since reading and mailing should normally accomplish the goal of adequately communicating the notice contents, and since this case was one in which a small, apparently identifiable portion of the unit was subjected to "hallmark" violations that were not "flagrant and repeated," we would not urge the Board to order newsletter/newspaper publication unless mailing proves ineffective (e.g., most former employees have moved without a forwarding address) or the alleged discriminatees are not easily identifiable.

Finally, reasonable union access to an employer's facility is usually ordered in combination with the extraordinary remedies of notice reading and notice mailing where a large portion of the bargaining unit is exposed to the "hallmark" conduct. The access remedies are designed to assist the union in communicating with the employees, and to assist the employees in hearing the union's side of the story without fear of retaliation. 640 F.2d at 399. This remedy has been reserved for cases where the percentage of

the bargaining unit exposed to the "hallmark" conduct is more significant than the percentage exposed here, and we decided not seek it here. Rather, as discussed above, we decided only to argue that the Board expand the use of extraordinary remedies by ordering notice reading and mailing where the employer has committed Section 8(a)(1) hallmark violations and the percentage of the bargaining unit exposed to the violations is more than insignificant.

Section 10(j) Authorizations

During the first two quarters of Fiscal Year 1996, the Board authorized a total of 34 Section 10(j) injunction proceedings. Most of the cases fell within factual patterns set forth in General Counsel Memoranda 89-4, 84-7 and 79-77. As contemplated by those memoranda, these cases are described in the chart set forth below. For a fuller description of the case categories, the reader is directed to General Counsel Memoranda 89-4, 84-7 and 79-77.¹

One case during the reporting period was somewhat unusual and therefore warrants special discussion.

The Region had issued a Section 8(a)(1) complaint based upon the discharge of employees who had concertedly protested working conditions in their non-union facility. The employees on one shift had ceased work and had protested to their employer about safety concerns. The employer had responded with threats about the protest and had discharged several of the protesters. Some of the protesters then engaged in a strike to protest the employer's actions. After some of the strikers asked to return to work, the employer refused to reinstate them. The employer had also threatened both the strikers and employees on other shifts against attempting to unionize the facility. The Region's complaint alleged as unlawful the threats, the discharges and the refusal to reinstate unfair labor practice strikers.

We decided that interim relief under Section 10(j) was needed to prevent irreparable injury to employee statutory rights. The employer's unfair labor practices were aimed at stifling all concerted protected activities by its employees to improve their working conditions. Absent interim reinstatement of the unlawfully discharged employees and the strikers, we believed that the "chilling" impact of the violations upon the unit employees' free exercise of Section 7 rights would be irreparable and the Board's order in due course would be unable to adequately restore the lawful status quo. The strong evidence here of the employer's intent to quash any further protected activities of its employees distinguished this case from the adverse 10(j) decision in Eisenberg v. Lenape Products, Inc.² Unlike the unlawful 8(a)(1) discharges in Lenape which were

¹ See also NLRB Section 10(j) Manual, Appendix A, "Training Monograph No. 7."

² 781 F.2d 999, 121 LRRM 2617 (3d Cir. 1986).

viewed by the Third Circuit as "an isolated event,"³ it was clear that the employer's entire course of conduct was to leave a strong warning to all employees in the shop that protected activity would not be tolerated and employees would suffer greatly if they breached the employer's prohibitions.⁴

After the 10(j) petition was filed, the employer entered into an appropriate non-Board adjustment of the unfair labor practice case.

The 34 authorized cases fell within the following categories, as defined and described in General Counsel Memoranda 89-4, 84-7 and 79-77:

Category	Number of Cases in Category	Results
1. Interference with organizational campaign (no majority)	12	Won four cases; one case settled before petition; four cases settled after petition; three cases are pending.
2. Interference with organizational campaign (majority)	4	Won one case; one case settled after petition; two cases are pending.
3. Subcontracting or other change to avoid bargaining obligation	0	- - - - -
4. Withdrawal of recognition from incumbent	5	Won one case; one case settled before petition; three cases are pending.

³ Id., 781 F.2d at 1005.

⁴ See generally Silverman v. Whittall & Shon, Inc., 125 LRRM 2150, 2151 (S.D.N.Y. 1986).

<u>Category</u>	<u>Number of Cases in Category</u>	<u>Results</u>
5. Undermining of bargaining representative	4	Won one case; one case settled before petition; two cases are pending.
6. Minority union recognition	1	Case is pending.
7. Successor refusal to recognize and bargain	6	Won two cases; two cases settled before petition; one case settled after petition; one case is pending.
8. Conduct during bargaining negotiations	0	- - - - -
9. Mass picketing and violence	0	- - - - -
10. Notice requirements for strikes and picketing (8(d) and 8(g))	0	- - - - -
11. Refusal to permit protected activity on property	0	- - - - -
12. Union coercion to achieve unlawful purpose	0	- - - - -
13. Interference with access to Board processes	0	- - - - -
14. Segregating assets	0	- - - - -
15. Miscellaneous	2	One case settled after petition; one case mooted by Board order.